CC 1.12/2d:91/6 284-A

VOL 91 (2d Series) March 1–31, 1983 No. 6

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# FEDERAL COMMUNICATIONS COMMISSION REPORTS (91 F.C.C. 2d)

**Decisions, Reports, Public Notices, and Other Documents of the Federal Communications Commission of the United States**

**VOLUME 91 (2d Series)**
**Pages 854–1067**

**Reported by the Commission**

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COMSAT, Authorization Conditions on
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Interference, Corrective Measures

Interference, Harmful
Land Mobile Service

Permittee of new TV station created interference to land mobile services. Commission ordered reduction in power pending corrective action. After taking some corrective measures, permittee requested power increase to 50%. Request denied, and ordered to implement further corrective measures within 30 days.
—*Broadcast Corp. of Georgia*

FCC 82–432

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

In the Matter of

BROADCAST CORPORATION OF GEORGIA,
Permittee of Television Station
WVEU, Channel 69,
Atlanta, Georgia,

Request for authority to operate at 50%
authorized power

MEMORANDUM OPINION AND ORDER

Adopted: September 29, 1982; Released: October 4, 1982

BY THE COMMISSION: COMMISSIONER QUELLO ABSENT;
COMMISSIONER WASHBURN CONCURRING IN THE RESULT.

1. Before the Commission is a request filed by the Broadcast Corporation of Georgia (hereinafter WVEU), permittee of commercial television station WVEU, Channel 69, Atlanta, Georgia. WVEU seeks authority to operate at 50% of authorized power, notwithstanding the fact that such operation produces interference to land mobile radio services operating on adjacent frequencies. WVEU argues that total elimination of interference cannot be accomplished with the state-of-the-art technology available today. Thus, WVEU contends that the Commission must bal-

ance the service provided by land mobile radio operations against the service provided by the new television facility and decide which operation better serves the public interest. We believe that because there are additional measures, as yet untried by WVEU, that may remedy the interference problems, it is premature to make the choice between services advocated by WVEU. We will, instead, as fully described below, require WVEU to implement additional measures to correct harmful interference to the land mobile radio users operating on frequencies adjacent to Channel 69.

2. The history of this case dates to January 28, 1976, when the Commission assigned Channel 69 (800–206 MHz) to Atlanta, Georgia. *Report and Order in Docket No. 23075*, 41 F.R. 5637, 36 R.R. 2d 188 (1976). Thereafter, a number of mutually exclusive construction permit applications were received, requring the designation of a comparative hearing. Through settlement agreements and mergers, WVEU emerged as the sole applicant and was granted a construction permit on October 11, 1980. On January 27, 1981, WVEU tendered an application for modification of its construction permit to change its transmitter location to the rooftop of the Peachtree Plaza Hotel in downtown Atlanta. This application was granted on February 4, 1981. WVEU completed construction of its authorized facilities and, pursuant to Section 73.1620 of the Commission's Rules, commenced program tests at its fully authorized power of 2630 kW visual effective radiated power. Thereafter, complaints were received from 23 operators of land mobile facilities co-located with the WVEU transmitter, objecting to interference received from the Channel 69 operations. These complaints were unsupported by technical data. Broadcast Services, Inc., a communications management firm retained by the Peachtree Plaza Hotel to coordinate telecommunications facilities on its rooftop, also complained and provided engineering data supporting its allegation that 14 land mobile facilities were experiencing interference from the Channel 69 emissions.

3. The Commission's Field Operations Bureau (FOB) investigated the interference and confirmed that land mobile facilities on 806–807 MHz were desensitized by the strong out-of-band emissions of WVEU. A 30 dB reduction in the power of WVEU was recommended to protect the affected land mobile facilities.

4. The Broadcast Bureau implemented FOB's recommendation by issuing WVEU a "limited" program test authority requiring a 30 dB reduction in power (to 2.63 kW visual effective radiated power) Monday through Saturday, from 5 AM to 7 PM, the peak usage hours of land mobile services, pending action by WVEU to correct the interference. (WVEU broadcasts in a subscription mode during the evening and al-

leges that its STV revenues are vital to continued operation.[1] To that end, WVEU contracted for the design, manufacture and installation of suitable transmitter filters which were expected to resolve the problem. One high power filter was installed on February 2, 1982, and, under a special temporary authority, tested at half-power for two weeks in order to assess the effectiveness of the filter. Nineteen land mobile facilities complained of objectionable interference resulting from WVEU's half-power operation but, again, provided no supporting technical data. The facilities further requested that the Commission order WVEU to cease operations until the interference was eliminated.

5. On April 13, 1982, WVEU requested authority to operate at 50% of full power for a period of six months. It alleged that the affected land mobile operators "have not made any real attempt to cooperate and reach a mutual solution, but rather relied one hundred percent on WVEU(TV) to cure the problem to their satisfaction." WVEU stated that "[b]eing allowed to operate at 50% power for a period of six months will put substantial pressure on the two-way radio licensees and hopefully will produce a real effort on their part to work with WVEU(TV) toward a mutually satisfactory solution."

6. WVEU's test results, and a report prepared by the FOB, indicated that the high power filter was effective enough in reducing out-of-band emissions to warrant some increase in daytime power. However, the correction was not effective enough to warrant WVEU's operation at half power. Consequently, on April 28, 1982, the Broadcast Bureau modified WVEU's limited program test authority to permit an increase in power to 166 kW (12 dB below authorized power). To date, several complaints of continued interference from this new level of operation have been received.

7. The interference resulting from the activation of WVEU's facilities is apparently due to three major factors:

1) The high power operation of WVEU (2630 kW visual effective radiated power), and the relatively low power operation of the land mobile repeaters;
2) The operation of the two services on immediately adjacent frequencies (Channel 69 on 800–806 MHz; land mobile facilities 806.0125 MHz and higher); and
3) The close physical proximity of the WVEU transmitting antenna to the land mobile repeaters (50 to 100 feet apart on the roof of the Peachtree Plaza Hotel).

---

[1] WVEU states that it has been losing approximately $20,000 per month since September 1981, has spent approximately $3,700,000 to date in constructing this station, and is presently facing bankruptcy.

8. Section 73.687(i)(1) of the Commission's Rules requires television stations to attenuate out-of-band emissions, 3 MHz and beyond their channel edges, at least 60 dB. Should interference still be caused to other services, greater attenuation is required. These requirements have usually proved adequate in minimizing interference. In the present case, however, 60 dB attenuation still results in out-of-band emissions with a near field signal strength of about 370 mV/m, well above the land mobile receivers' sensitivity levels, due to WVEU's high power operation. Land mobile receivers can no longer receive the relatively weak signals from mobile units beyond a certain threshold. This has either resulted in drastically reduced service areas for the land mobile facilities, or has made them completely unusable.

9. WVEU states that "everything within the present state of the art has been done to eliminate or limit the interference problem . . . [and it] knows of no action that can be taken to reduce the interference to a substantially less level than it is presently." We disagree. Not all of the technical measures available to WVEU to resolve the interference have been tried even though the station has undertaken numerous measures to avoid and/or to alleviate interference. For example, WVEU consulted with Broadcast Services, Inc. regarding potential interference throughout construction; it secured six cavity filters to test their effect on land mobile facilities during equipment tests; it arranged meetings for all affected parties and service companies; it used various measures to shield the two-way receivers; it made minor modifications to WVEU's transmitters (with minimal success); and it installed one high power filter on one visual transmitter. However, only one of the above measures, the installation of the high power filter, has proved significantly effective in resolving the interference in question. That cannot be considered a final solution to the problem. Additional measures available to WVEU include:

1) installation of cavity filters on affected land mobile receivers;
2) installation of a second high power filter after the diplexer of WVEU's transmitter;
3) identification and correction of intermittent (probably heat related) spurious emissions which appear in off-the-air measurements;
4) changing the frequency of affected land mobile facilities;
5) changing the location of affected land mobile facilities to provide comparable service;
6) changing the transmitter location of WVEU;

10. WVEU, as the "newcomer," has the responsibility to implement effective measures to rectify the interference caused to other authorized and existing services by its operations.[2] We will, therefore, order WVEU

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[2] *Sudbrink Broadcasting of Georgia, Inc.*, 65 FCC 2d, 691, 692 (1977).

to take additional corrective measures to eliminate harmful interference to the land mobile radio users.[3] We also direct the land mobile licensees to cooperate with WVEU for the benefit of all parties involved by offering suggestions to resolve the problem.[4] We will expect full cooperation by the land mobile radio users, although the burden of correcting the interference, financial and otherwise, is upon WVEU.

11. Finally, with respect to WVEU's request for Commission consideration of the overall impact on the public interest of the two services in conflict, not all of the corrective measures available to WVEU have been tried. Until these measures prove to be unsuccessful and until it is established that elimination of harmful interference cannot be accomplished under the present state of the art, there is no need to choose between the services.

12. Accordingly, IT IS ORDERED, That the request of WVEU for authority to operate at half-power for six months IS DENIED.

13. IT IS FURTHER ORDERED, That, within 30 days of the date of release of the Order, WVEU SHALL COMMENCE implementation of corrective measures to eliminate harmful interference to the land mobile radio users and within 90 days thereafter show that the interference has been eliminated or that substantial progress to this end has been made.

14. IT IS FURTHER ORDERED, That should WVEU fail to carry out the directives contained in this Order, the Chief, Broadcast Bureau, IS DIRECTED to expeditiously bring this matter to the attention of the Commission.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

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[3] The options specified in paragraph 9, above, are illustrative. WVEU may wish to explore additional options as well.

[4] See *Jack Straw Memorial Foundation*, 35 F.C.C. 2d 397, *reconsideration denied*, 37 F.C.C. 2d 544 (1972).

COMSAT, Authorization Conditions on
COMSAT, Financing Proposal

Comsat request to acquire short-term debt financing under Section 201(c)(8) of the Communications Satellite Act of 1962 approved. Comsat intends either to extend existing lines of credit, establish new lines-of-credit or issue commercial paper for a maximum amount of 70 million dollars to meet the cash requirements of its central corporate activities and its World Systems Division. See also COMSAT, FCC 2d 931 (1982).
—*COMSAT*

FCC 82–419

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

| | |
|---|---|
| In the Matter of | |
| COMSAT REQUEST TO ACQUIRE DEBT FINANCING | I–S–P–82–003 |

MEMORANDUM OPINION AND ORDER

Adopted: September 17, 1982; Released: September 24, 1982

BY THE COMMISSION:

1. Pursuant to Section 201(c)(8) of the Communications Satellite Act of 1962,[1] the Communications Satellite Corporation (Comsat) has requested authority to acquire $70 million in debt financing either by issuance of commercial paper, establishment of new lines of credit or extension of existing lines of credit.[2] Public notice of this request was given on August

[1] On November 25, 1981, Comsat sought Commission authorization to acquire up to $30 million in short-term debt, either through the issuance of commercial paper or the establishment of lines of credit, to meet its projected cash requirements for 1982. The Commission approved Comsat's request, with conditions, on January 22, 1982. See COMSAT, 88 FCC 2d 931 (1982). By letter dated February 4, Comsat informed the Chief, Common Carrier Bureau, that it had entered into agreements establishing four lines of credit, each not to exceed $7.5 million.

[2] Under Section 201(c)(8), the Commission shall "authorize [Comsat] . . . to borrow any moneys . . . upon finding that such . . . borrowing . . . is compatible with the public interest, convenience, and necessity and is necessary or appropriate for or consistent with carrying out the purposes and objectives of this Act by the corporation." 47 U.S.C. Section 721(c)(8)(1979).

5, 1982. Report No. 1097. No comments in opposition to this request have been filed.

2. In its letter of July 22, 1982, Comsat states that upon review of its financial requirements for the remainder of 1982, it now projects capital expenditures of approximately $74 million over and above those originally projected in November of 1981. Comsat indicates that an additional $6.3 million will be required for its participation in various INTELSAT programs, such as the INTELSAT V and V–A programs, because its expected capital outlays for these programs will be closer to INTELSAT's projections than those made by Comsat in November 1981. Moreover, Comsat now projects that through the end of the year an additional $25 million will be required for its participation in various ESOC and COMSAT Earth Station programs, such as the Lennox diversity earth stations and the addition of 1982 and 1983 traffic handling capability to existing earth stations. Comsat also indicates that although unanticipated in November 1981, a $9.7 million contribution was required in May of 1982 to pay for a one percent increase in Comsat's ownership share in INTELSAT. Finally, Comsat lists two expenditures which it says were not included in its November 1981 projections: approximately $19.8 million for Comsat Laboratories building construction, test equipment and other projects, and approximately $13 million for tax benefits, payable by Comsat to COMSAT General under a tax allocation agreement entered into by the two companies.[3]

3. Balancing anticipated additional capital expenditures of approximately $74 million against an anticipated $19 million increase in its revenues, Comsat states that its capital requirements for 1982 have increased by nearly $55 million. However, Comsat seeks authority to borrow up to $70 million: $55 million to cover its capital requirements, and $15 million to provide a safety margin "to offset any unforeseen cash flow requirements or fluctuations through the remainder of 1982 in connection with World Systems Division or other corporate activities." Comsat believes that its request to borrow $15 million more than it needs to meet its immediate requirements is reasonable in light of frequent daily fluctuations in its cash flow which make adherence to fixed money limits very

[3] In 1975, as a condition to establishing a line of credit for the use of COMSAT General, the financial institutions involved required Comsat and COMSAT General to enter into a tax allocation agreement memorializing the prior and existing understanding between the two parties relating to their filing of consolidated Federal income tax returns, the allocation of the consolidated tax liabilities between them, and reimbursement of any benefits derived by one party as a result of including the other in the consolidated returns. In connection with the execution and performance of the credit agreement and the tax allocation agreement, Comsat informed the Commission that the banks required an unqualified assurance that no approvals of any regulatory authority, including the Commission, were needed. By letter dated November 17, 1975, the Commission notified Comsat that the making and performance of these agreements would be consistent with existing Commission orders and that no Commission approval was needed therefore.

difficult, and that authorization to borrow $70 million rather than $55 million would obviate the need to return to the Commission this year for additional borrowing authority.

4. As to its ability to secure the funds it requires if Commission approval is forthcoming, Comsat asserts that financing would be undertaken pursuant to the arrangements described in its November 1981 request, and subject to the same conditions set forth by the Commission in its January 1982 grant of authority. Comsat's traditional bank lenders have indicated an immediate willingness to provide this additional financing. In conjunction with the latter point, Comsat requests that this matter be given expedited consideration. Comsat states that it will need at least $20 million of the $70 million during the weeks of September 13, 1982 and September 20, 1982 to meet operating expenses and other obligations, including a September 15, 1982 Federal income tax payment of $2 million and payments to INTELSAT of approximately $10 million.[4]

*Discussion*

5. We shall approve Comsat's request to acquire $70 million in additional short-term financing. The infusion of these funds should enable Comsat to continue to serve the interests of the United States in INTELSAT.

6. Of the $74 million in additional expenditures now projected by Comsat, approximately $41 million is required to pay for various on-going and new INTELSAT and ESOC programs and for Comsat's increased ownership interest in the global system. We find such expenditures necessary and appropriate for carrying out the purposes and objectives of the 1962 Act. With respect to the $19.8 million Comsat wishes to borrow to invest in Comsat Labs, we have already recognized in our *Comsat Structure* decision the importance of the work performed at Comsat Labs in the area of satellite technology research and development.[5] In authorizing Comsat to borrow money to make improvements in these facilities, we direct Comsat to adhere to the conditions set forth in the *Comsat Structure* decision with respect to allocation of costs for Comsat Labs investment and expenses between its basic corporate R&D and R&D that results in benefits for Comsat's corporate affiliates.[6]

7. We view the $13 million in tax benefits Comsat must transfer to COMSAT General under the tax allocation agreement as a legitimate business expense for which Comsat is responsible. Comsat should be allowed to obtain funds from external sources to meet its legitimate business expenses and other day-to-day corporate needs. Therefore, with

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[4] *See* letter from Bruce L. Crockett, Vice President, Finance and Treasurer, Comsat, to Chief, Common Carrier Bureau; September 9, 1982.

[5] *See* Communications Satellite Corporation, FCC 82-372, adopted August 5, 1982.

[6] *Id.*, paras. 61–64.

respect to all of the itemized expenditures discussed above, Comsat has met the tests set forth in Section 201(c)(8) of the 1962 Act and is authorized to acquire $55 million in debt financing to cover its costs.

8. It also appears to us that Comsat's request to acquire an additional $15 million to protect against any unforseen cash flow requirements or fluctuations during the remainder of 1982 is reasonable. Ratepayers, who ultimately must bear the cost of Comsat's debt, may well benefit if Comsat acts expeditiously to acquire the full amount it seeks now, rather than in the future when interest rate conditions may not be as favorable. Moreover, with the addition of the $70 million we authorize Comsat to acquire pursuant to this Order, the Corporation will have in its capital structure $100 million of debt, an amount well within the 45/55% debt-to-equity capital structure we imputed to Comsat in our decision in Docket No. 16070.[7]

9. Consistent with our initial grant of authority for Comsat to acquire $30 million in debt financing, we shall require Comsat to file with the Commission the final terms and conditions of all agreements entered into to acquire the additional $70 million, and to allocate its cost of debt in a manner that will ensure that the ratepayer assumes liability only for that portion of the debt to be used for jurisdictional (INTELSAT/INMARSAT-related) activities. Comsat shall separately record any portion of the $70 million expended on competitive activities. As a final matter, we wish to note that Comsat has requested expedited action to enable it to meet its day to day operational expenses. In the future, we expect Comsat to adhere to the 90 day notice requirement set forth in Paragraph 109 of our *Comsat Structure* decision. See FCC 82–372, released August 13, 1982.

10. IT IS THEREFORE ORDERED, pursuant to Section 201(c)(8) of the Communications Act of 1962, 47 USC§ 721(c)(8)(1979), that Comsat IS AUTHORIZED, subject to the conditions above described, to obtain additional short-term debt financing in an amount not to exceed $70 million.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

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[7] In re Communications Satellite Corporation (Comsat Rate Proceeding), 56 FCC 2d 1101 (1975). *See also* Communications Satellite Corporation v. FCC, 611 F. 2d 883 (D.C. Cir. 1977); In re Communications Satellite Corporation, 68 FCC 2d 941 (1978). Approval of Comsat's request will enable Comsat to obtain $100 million in short-term debt. However, given such substantial reliance on short-term debt, questions arise as to Comsat's long-term plans for financing the activities in which it intends to become involved in the future. Comsat has indicated that before the end of the year it will file a long-term financing plan. We direct Comsat to address in its financing plan the extent to which it intends to rely on short-term debt and how such reliance comports with the Commission's determination to impute a 45/55% debt-to-equity capital structure for the Corporation.

CATV Program Exclusivity; Same Day
Petition for Special Relief

Petition for Special Relief to retain same day network nonduplication protection denied. Petitioner's showing is insufficient for waiver under standard, applicable to *Second Report and Order in Docket 19995*, 54 FCC 2d 229.
—*Four States Television, Inc.*

FCC 82–439

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

| In re: | |
|---|---|
| FOUR STATES TELEVISION, INC. | CSR–1215 |
| Farmington, New Mexico[1] | (NM0010) |
| Aztec, New Mexico | (NM0020) |
| Petition for Special Relief | |

MEMORANDUM OPINION AND ORDER

Adopted: October 6, 1982 Released: October 15, 1982

BY THE COMMISSION:

1. We have before us today a "Petition for Special Relief" filed by Four States Television, Inc., licensee of Station KIVA-TV (NBC, chanel 12) Farmington, New Mexico, requesting a waiver of Section 76.92 of our network nunduplication rules. In its petition, Four States (hereinafter KIVA) asks for a continuation of the special relief granted to it in *Four States Television, Inc.* (Farmington, New Mexico), FCC 76–533, 59 FCC 2d 1159 (1976). In the above decision, KIVA was granted a waiver giving it same day rather than simultaneous network nonduplication protection.

*History*

2. With the release of the *Second Report and Order in Docket 19995*, FCC 75–820, 54 FCC 2d 229 (1975), the Commission adopted a uniform

[1] On January 30, 1981, Four States sold Station KIVA-TV to Group Broadcasting, Inc. However, for the purpose of consistency with prior decisions we will continue to refer to Four States as the moving party in this proceeding.

standard of simultaneous network program nonduplication protection for all television stations located in the Mountain Time Zone (MTZ). However, recognizing at that time that certain stations in the MTZ, such as KIVA, might need a greater degree of protection than that provided for by simultaneous network nonduplication protection, the Commission set forth detailed special relief procedures. See *Second Report and Order, supra,* at Paragraph 26. In *Four States Television, Inc. supra,* KIVA submitted the evidence called for to obtain a waiver of the then newly adopted simultaneous network nonduplication standard. KIVA submitted the programming schedules of the relevant cable systems detailing the percentage of NBC programming broadcast by KIVA that would lose network nonduplication protection in the event a waiver was denied. Additionally, in accordance with the above Commission docket, KIVA submitted an analysis of the average loss of audience it would sustain, as well as an analysis of the expected annual revenue it would lose should a waiver be denied, and the effect of such a loss on KIVA's ability to serve the public interest. Lastly, KIVA submitted its Commission financial reporting forms, FCC 324, for the three preceeding years plus a balance sheet for the most recent year.

3. The Commission's analysis of the above evidence showed that failure to grant the requested waiver ". . . could well have a pronounced negative impact on the station's ability to achieve and maintain economic viability." *Four States, Television, Inc., supra,* at 1168. Therefore, the Commission granted KIVA's waiver request and required the above captioned cable systems to black out the NBC network programming of Television Broadcast Stations KOB-TV (NBC, Channel 4) Albuquerque, New Mexico, and KREZ-TV (CBS/NBC, Channel 6) Durango, Colorado, if the identical programs were to be broadcast by Station KIVA-TV at any time during that same day (same day network nonduplication protection). Without such a waiver, the above-captioned cable systems would have been only required to black the NBC network programming broadcast by the above stations when Station KIVA-TV was simultaneously broadcasting the same programming (simultaneous network nonduplication protection). In granting the above waiver, the Commission also took into consideration the fact that KIVA was then a relatively new station, having commenced service in 1972, that KIVA had not yet been able to obtain network compensation for its network programming, and the small size of the Farmington market.

4. However, recognizing that KIVA-TV's financial status could improve in the future thereby eliminating the need for continued same day network nonduplication protection, the Commission conditioned its waiver by stipulating that within eighteen months of the initial grant KIVA was to submit a petition in support of the waiver's continuation. On December 28, 1977, KIVA-TV filed the required petition asking for an extension of

same day network nonduplication protection. Teleprompter of Farmington and San Juan Cable TV, Inc., (hereinafter Teleprompter), which operate in Farmington and Aztec, New Mexico, respectively, filed oppositions to KIVA's petition and KIVA replied.

5. By letter dated September 15, 1980, the Chief, Cable Television Bureau, in recognition of the delay between KIVA's submission of its special relief petition and the Commission's consideration of it, requested that KIVA update its filing, since the latest financial information contained therein related to the year 1977.[2] Additionally, in view of the fact that subsequent to KIVA's 1977 filing the Commission made a substantial change in its network nonduplication rules effecting the rights of KIVA *vis a vis* the significantly viewed signal of Station KOB-TV, KIVA was given an opportunity to submit any new evidence it considered relevant to its pending petition.[3] Teleprompter was given an opportunity to file reply comments and did so on October 20, 1980.

*Arguments*

6. In support of the continuation of same day protection, KIVA filed a "Supplement to Petition for Special Relief". KIVA contends it is obvious from the financial documents it has attached to its supplement that it could not withstand the financial impact that would result from a loss of same day protection. In support of this contention, KIVA has submitted its Commission financial reporting forms, FCC Form 324, for the years 1977 to 1979 which show losses ranging from a high of $267,226 in 1977 to a low of $10,503 in 1978. In addition, KIVA has also submitted financial statements for KIVA for November 30, 1977 to 1979; financial statements for the Broadcast Equipment Associates (BEA) for December 31, 1977 to 1979; and a combined financial statement for BEA and KIVA as of July 31, 1980. BEA is a partnership whose principals are the stockholders of KIVA. KIVA leases its buildings and broadcast equipment from BEA for a monthly fee.

7. In response, Teleprompter contends that KIVA has failed to carry its burden of proof in this proceeding.[4] In support of this contention, Tele-

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[2] During the period subsequent to its December 28, 1977 filing, Four States has retained its same day network nonduplication protection.

[3] In 1978, the Commission amended its network nonduplication rules by its adoption of Section 76.92(g). This section of the rules abolished the former requirement that cable operators blackout the network programming of significantly viewed stations they carried. Since Station KOB–TV is significantly viewed in San Juan County, New Mexico, the County in which the above cable systems are located, neither cable system would have to blackout KOB-TV's network programming in the event KIVA's petition is denied. See para. 7 *infra*.

[4] Additionally, Teleprompter has raised a procedural objection to KIVA's supplemental pleading. Teleprompter asserts that since KIVA's supplemental pleading is unverified, the Commission should not consider any evidence contained therein except for KIVA's Commission financial reporting forms. In light of our decision today on the merits of KIVA's waiver request this procedural argument has been rendered moot and will be dismissed accordingly.

prompter argues that KIVA's supplement makes no effort to show how its alleged broadcasting losses threaten its ability to serve the public interest. Teleprompter points out that KIVA's supplement is devoid of any analysis regarding the potential for audience diversion should it lose same day network nonduplication protection. Moreover, in regard to Station KOB-TV, which is significantly viewed, Teleprompter contends that KIVA has failed to carry the burden of proof necessary to obtain a waiver of Section 76.92(g) of the Commission's Rules, which abolished the requirement that cable operators backout the network programs of significantly viewed stations they carry. In rebuttal of KIVA's characterization of itself as a struggling television broadcast station, Teleprompter points out that KIVA has signed a letter of intent to sell KIVA-TV for $1,934,905 nearly two and a half times more than it paid for the station in 1977. Teleprompter contends that an examination of KIVA's Commission financial reporting forms for the years since 1976 show steadily increasing broadcast revenues contrasted with an inability to check its expenses should not be grounds for retention of same day protection.

*Discussion*

8. In this proceeding KIVA has requested an extension of the original network nonduplication waiver granted to it in *Four States Television, Inc. supra.* As a general principle, the Commission has required a petitioning licensee, such as KIVA, seeking additional protection beyond that conferred by our rules to submit relevant factual and financial information in support of its waiver request and to show by this evidence how the public interest would be served by a grant of the requested waiver. As the Commission stated in the *Cable Television Report and Order,* FCC 72–108, 36 FCC 2d 142, 149 (1972); "the essential consideration is not the extent of cable penetration or audience fragmentation *per se*, but rather, a demonstration of the effect of cable operations on station revenues and profits and their ability to serve the public interest."

9. Subsequent to KIVA's filing of its 1977 special relief petition seeking an extension of its original waiver, granted to it in *Four States Television, Inc., supra,* the Commission amended its network nonduplication rules with the adoption of Section 76.92(g). Section 76.92(g) of the Commission's rules abolished the requirement that cable operators blackout the duplicating network programming of significantly viewed stations they carried. In taking this action, the Commission concluded that significantly viewed stations were local in nature and, therefore, should be afforded full carriage rights. *Third Report and Order in Docket 19995,* FCC 78–217, 67 FCC 2d 1303 (1978), *granting recon. of* FCC 76–1076, 62 FCC 2d 99 (1976), *stay granted in part* FCC 78–331, 68 FCC 2d 1461 (1978). The Commission's adoption of Section 76.92(g) of the Rules was affirmed upon judicial appeal, *Spartan Radiocasting Company v. Federal Communications Commission,* 619 F.2d 314 (4th Cir. 1980).

10. In both the *Second* and *Third Report and Orders in Docket 19995*, the Commission expressed concern that certain local broadcasters' economic viability could be threathened as a consequence of changes in the Commission's network nonduplication rules. Since both of the above dockets relaxed constraints imposed by the Commission's network nonduplication rules upon cable operators, the waiver standard applicable to each is essentially identical. This is clearly evident from the language of paragraph 25 of the *Third Report and Order.* FCC 78–597, 68 FCC 2d 1461 (1978). Paragraph 25 specifically holds that television stations that had already received special relief under the provisions of the *Second Report and Order,* which charged the network nonduplication standard from same day to simultaneous protection, would not lose that protection even if the special relief granted was directed against a significantly viewed television station. See also *Henson Aviation, Inc.* (Hagerstown, Maryland), FCC 80–720, 83 FCC 2d 405 (1980).

11. In adopting a waiver standard for both of the above dockets, the Commission applied the aforementioned general waiver standard. Thus, to obtain a waiver of the Commission's simultaneous network nonduplication standard as well as Section 76.92(g) of the Commission Rules, a television broadcast station must submit detailed financial information incorporating an economic impact analysis which projects the degree of impact it will sustain from a reduction in network nonduplication protection. The station must also correlate the above loss to a reduction in its ability to serve the public interest. The Commission has held that the mere recitation of past financial losses is inadequate to carry the burden of proof necessary to obtain a waiver of our network nonduplication rules. See Paragraphs 25 and 10 of the *Second and Third Reports and Orders, supra,* respectively. See also *Virginia Broadcasting Corporation* (Charlottesville, Virginia), FCC 82–192, 89 FCC 2d 1152 (1982); *KDUB-TV, Inc.* (Dubuque, Iowa), FCC 80–624, 83 FCC 2d 153 (1980), *recons. denied,* FCC 81–62, 85 FCC 2d 572 (1981), *modified,* FCC 81–530, 88 FCC 2d 450, *recons. denied* FCC 82–182, 89 FCC 2d 994 (1982). *Texas Community Antenna Inc.* d/b/a *Nacogdoches Cable TV,* (Nacogdoches, Texas), FCC 78–525, 68 FCC 2d 1271 (1978); *Nor Cal Cablevision, Inc.* (Oroville, California), FCC 77–355, 64 FCC 2d 1094 (1977); and *KMOS-TV, Inc.*, FCC 75–1402, 57 FCC 2d 251 (1975).

12. Judging KIVA's showing by the above standard, we are compelled to deny its request for a continuation of same day network nonduplication protection. In support of its petition, KIVA, maintains that it is obvious from its history of financial losses that it is entitled to a continuation of same day network nonduplication protection. In support of this proposition, KIVA has merely introduced into evidence its Commission financial reportig forms, FCC 324 for the years 1977 to 1979, as well as financial statements for itself and BEA which allegedly show substantial prior

losses. Unlike its previous showing KIVA's current showing in its supplement is devoid of the required analysis noted in paragraph 11. Apart from merely listing its prior alleged losses, it has made no attempt to address the ultimate issue to be resolved in this proceeding—how would a loss of same day network nonduplication protection substantially diminish its ability to serve the public interest? KIVA has made no attempt to project the actual losses it anticipates from a reduction in network nonduplication protection, nor has it attempted to correlate those losses to its ability to serve the public interest. Moreover, unlike the circumstances surrounding the Commission's prior decision, KIVA has now been in operation for over ten years. Additionally, KIVA is currently receiving network compensation that in 1979 amounted to over $74,000.

13. Even apart from the fact that KIVA has failed to submit the required analysis to receive a waiver, we find the financial information submitted by KIVA to be of limited probative value. Through its financial showing, KIVA apparently hoped to demonstrate to the Commission that a continuation of the waiver previously granted to it was necessary to insure its economic viability. However, we are unable to make such a finding based upon the financial information before us. In this regard, we note that KIVA's financial showing in various instances is substantially incomplete and inconsistent. At paragraph 26, of the *Second Report and Order* the Commission specifically held, that in support of a waiver the following information must be submitted: "A complete explanation should be included for large or unusual expense items, particularly in these categories: (1) management or other services provided by the home office or affiliates, (2) other payments to principals, and (3) depreciation expense." KIVA has failed to make such a submission. For example, although KIVA leases its buildings and broadcast equipment from BEA, KIVA's Commission financial reporting forms, FCC 324, disclosed large depreciation expenses. Also, KIVA's filings reflect a consolidated financial position between itself and BEA. Apart from submitting a consolidated income statement and balance sheet for the period ending July 31, 1980, KIVA's financial consolidation with BEA is undisclosed. In this regard, KIVA has failed to disclose the length of the fiscal period covered in its July 31, 1980, combined statements; it has failed to submit a full complement of financial statements regarding its relationship between itself and BEA: and, furthermore, it has failed to include a footnoted explanation of the accounting methods used in generating the above combined financial statements. Moreover, in large part, KIVA, has failed to correlate the starting periods of the financial information it has submitted. Additionally, KIVA's FCC 324 forms show large increases in certain categories of expenses from year to year without explanation. For example, the expense category of KIVA's 1978 Commission financial reporting

form for local talent went from $30,202 in 1978 to $124,310 in 1979 with no explanation.

In view of the above, we find that a grant of the requested waiver would be inconsistent with the public interest.

Accordingly, KIVA's showing is insufficient for waiver under the standard applicable to the *Second Report and Order in Docket 19995, supra,* regarding simultaneous network nonduplication protection and the *Third Report and Order In Docket 19995, supra,* regarding significantly viewed stations. Consequently, we find that based upon the record before us, KIVA is no longer entitled to a continuation of extraordinary network nonduplication protection.

Accordingly, IT IS ORDERED, That the "Oppositions to the Petition for Special Relief" ARE GRANTED and that the waiver request, CSR–1215, filed by Four States Television, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

Ineptness Issue
Misrepresentation, Character Qualifications
Renewal Applicant v. New Applicant
Reports, Failure to File
Technical Qualifications

In a comparative renewal proceeding, Review Board affirmed ALJ's grant of CP to new applicant. Renewal applicant was disqualified on ineptness, transfer of control, reporting, misrepresentation and technical issues.
—*George E. Cameron Jr. Communications*
Docket No. 20629

FCC 82R–58

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

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| In re Applications of | |
| GEORGE E. CAMERON JR. COMMUNICATIONS (KROQ)<br>Burbank, California | Docket No. 20629<br>File No. BR–2724 |
| For Renewal of License | |
| ROYCE INTERNATIONAL BROADCASTING COMPANY<br>Burbank, California | BC Docket No. 79–65<br>File No. BP–20,111 |
| BAKER-SMITH COMMUNICATIONS, INC.<br>Burbank, California | BC Docket No. 79–66<br>File No. BP–20,191 |
| For Construction Permits | |

*Appearances*

*Keith E. Putbrese, David M. Hunsaker, George L. Lyon, Jr.*, and *Robert B. Kelley*, on behalf of George E. Cameron Jr. Communications and Burbank Broadcasting Co.; *Michael L. Glaser* and *Kathy J. Bible*, on

behalf of Royce International Broadcasting Company; *Stanley B. Cohen* and *Joel H. Levy*, on behalf of A.W.A.R.E. Communicators, Inc.; *Lewis I. Cohen* and *Roy W. Boyce*, on behalf of San Marco Broadcasting Company; and *Robert A. Zauner*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

Adopted: September 20, 1982; Released: September 24, 1982

BOARD MEMBER BLUMENTHAL FOR THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of George E. Cameron Jr. Communications, Inc. (GECC) for renewal of license of KROQ (AM), Burbank, California, and Royce International Broadcasting Company (Royce) and Baker-Smith Communications, Inc. (Baker-Smith) for a construction permit for a new AM station to operate in Burbank on the same frequency as KROQ. By a series of Memorandum Opinions and Orders,[1] the applications were designated for hearing on numerous issues along with the renewal application of Burbank Broadcasting Co. (BBC) for KROQ-FM, Pasadena, California—GECC is wholly owned by BBC—and applications mutually exclusive with BBC filed by San Marco Broadcasting Company (San Marco) and A.W.A.R.E. Communicators, Inc. (A.W.A.R.E.). The Review Board severed the instant applications from the consolidated proceeding in a post-Initial Decision Memorandum Opinion and Order and remanded the Pasadena FM applications for further hearing on an issue added against San Marco. *See* Memorandum Opinion and Order, FCC 82R–27, released May 19, 1982, *review dismissed*, FCC 82–309, released July 12, 1982.

2. This proceeding is now before the Review Board on exceptions filed by GECC/BBC, jointly, and individually by Kenneth J. Roberts (Roberts), a 49% owner in BBC and party to this proceeding. *See* Memorandum Opinion and Order, FCC 77M–1670, released September 28, 1977. Replies were filed by Royce, the Broadcast Bureau, San Marco, A.W.A.R.E. and GECC/BBC.[2] Exceptions were not filed by Baker-Smith, and accordingly, its application will be dismissed with prejudice for failure to prosecute, pursuant to Section 1.276(f) of the Commission's Rules, 47 CFR § 1.276(f). The Board has reviewed the Initial Decision in light of the exceptions and briefs, the oral arguments held on July 9, 1982

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[1] *See* 56 FCC 2d 752 (1975), 58 FCC 2d 622 (1976), 67 FCC 2d 143 (1977), and 71 FCC 2d 460 (1979).

[2] A.W.A.R.E. also filed exceptions to the Initial Dicision. The exceptions and replies of the Pasadena applicants are being considered only insofar as they pertain to common issues having a bearing on GECC's basic qualifications to be a Commission licensee. *See* Review Board Order, FCC 82R–30, released June 10, 1982.

and our examination of the record. The ALJ's findings of fact are adopted, except as modified herein, and his ultimate conclusion that a grant to Royce would serve the public interest is affirmed.

*Issues Against GECC*

3. All told, thirteen issues relating to the basic and/or comparative qualifications of GECC were designated for hearing, either by the Commission or added later by the ALJ. *See* I.D., para. 2. In the Initial Decision, the ALJ made separate findings of fact and conclusions of law on all thirteen issues, including the ultimate issue of GECC's basic qualifications. He found against the licensee on eleven of the designated issues and for the licensee on the ascertainment issue and the financial qualifications issue. I.D., *Conclusions*, and paras. 17, 24. As to those issues determined adversely against GECC, the ALJ held that several issues (or related combinations of issues) would have each—standing alone—required the disqualification of GECC. These disqualifying factors were: ineptness, transfer of control, reporting failures, misrepresentation, and technical non-compliance.

4. In the main, we affirm the ALJ on both the underlying issues and on the ultimate qualifying issue. While we differ very slightly on the nature of the misrepresentation finding,[3] we otherwise find that the Initial Decision is correct in all respects in its findings of fact and conclusions of law. For purposes of our own review, however, we now have the benefit of the entire record as well as the exceptions and the briefs of the participating parties, all amplified by the oral argument heard by the Board. This deferred perspective permits a somewhat more comprehensive overview and allows us to address some of the separate issues in a slightly more functional manner than could the ALJ. Thus, for example, we generally perceive the several issues concerning GECC's ineptness, its reporting failures, its technical violations and its public file all to be more or less derivative subsets of the transcendent dereliction of a nearly complete abdication of control and responsibility by the licensed principals of GECC. As discussed more fully below, many—if not most—of GECC's serious and repeated failures to comply with pertinent regulatory standards appear to stem from either the inherent inability or the collective refusal of the licensee principals of GECC to have invested those personal and financial resources necessary to sustain the most minimal broadcast operation. Hence, although we continue to hold, as did the ALJ, that the licensee has revealed itself throughout as patently unqualified on the

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[3] Although we find that the principals of GECC, in connection with their application to purchase a pasadena, California FM (later KROQ-FM), filed a balance sheet that was "technically accurate," we also find that the licensee principals lacked the requisite candor in failing to inform the Commission that the purported financing from GECC was, or became prior to grant, pragmatically defunct. *See infra*, paras. 42–43.

discrete bases of the ineptness, the technical, and the reporting issues, and that any of these, individually, would be more than sufficient to deny renewal, we hereinbelow evaluate these three factors under the broader generic heading of "Abdication" to which they appear causally interconnected.[4]

*Abdication of Public Interest Responsibilities*

5. *Ineptness.* The Initial Decision documents in great detail the lamentable chronicle of management ineptitude and of an all but wanton abandonment of the public trust granted to GECC by the Commission and palpably represented by the KROQ broadcast license.[5] Indeed, the docket before us is a clinical model of the public interest standard intentionally vacated and subordinated to the individual pecuniary interests of the joint principals of the licensee. In synopsis, the record shows that shortly after its acquisition of KROQ in 1972 from the estate of the previous owner, George E. Cameron, Jr., GECC evidenced (1) a premeditated disinterest in the ongoing activities of the station, (2) a structural inability to competently direct the elementary affairs of a licensed broadcast station, and (3) a fatal propensity to elevate their respective private interests above the public interest which the Commission had reposed collectively in these GECC principals. Hence, the licensee has unequivocally demonstrated by its subsequent transgressions that the acquisition of the Burbank station was, from the very beginning, conceived of by the licensee principals as nothing more than an uncommon investment opportunity. Of the non-delegable public duties affixed thereto, the licensee principals were either ignorant or apathetic, or both.

6. In specific, the massive evidence proves that the KROQ principals willfully and knowingly delegated total control of the station to KROQ's staff general manager, Gary Bookasta, a catalyst of the investor syndicate but who personally had no ownership interest in the station. I.D., *Findings*, paras. 9–12. Moreover, it is shown by the testimony of the KROQ principals that they considered themselves merely passive speculators assembled randomly by Bookasta for joint venture purposes. For example, Anthony Coldeway testified that he understood his role in the company to be "just an investor" (Tr. 584). Kathleen Coldeway, an officer and director of GECC (Tr. 2049, 2181), asserted that she never took any active

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[4] We also hold that GECC is disqualified on the "Transfer of Control" and "Misrepresentation" issues, each of which woud have been also sufficient, standing alone, to deny renewal of the KROQ license. *See infra*, paras. 29–39, 40–43.

[5] Technically speaking, no "Abdication of Control" issue, as such, was designated against GECC in this case. Hence, by adverting, *passim*, to the failure of GECC to adequately supervise and maintain the station, we do not intend to add to, or change, the designated issues. Our reference to the record evidence which indicates an absence of requisite licensee control is, however, inextricable from the discussions surrounding the ineptitude, technical, reporting, and transfer of control issues upon which independent findings and conclusions are made.

part in the station's programming, its personnel, or its finances. *See also*, Tr. at 2061. Manuel Castillo stated that "we put that [capital] in as an investment. And we more or less forget about it." Tr. 1776.[6] Joe Gonsalves, a 10% owner, testified that he had no management responsibilities in the station (Tr. 2290–2291) or any involvement in its programming or engineering (Tr. 2294) and that he only "started putting money in to try to get out of the station" (*id.*). Sam and Neil Visser were also represented as merely dormant investors by their attorney, Richard A. Del Guercio. Tr. 3100. Additional licensee principals testified similarly. Edith Mitchell, for another, contended that she had "nothing" to do with the radio station (Tr. 1568) and that her sole interest was "to get back my money" (*id.*). Finally, even Jack Gonsalves, the company president of GECC, declared unabashedly that neither he nor the other principals, to his knowledge, were responsible for any of the activities of the station (Tr. 2334); that he had never seen the books or records of his company; and that he never once received data about its financial condition, or about its technical operation or, for that matter, about its programming. Tr. 2335. Actually, the integral relationship between KROQ and its licensee owners was perhaps best explained by Gary Bookasta who stated that GECC deliber-

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[6] At one time, it appears, Castillo was elected as president of the company, but his testimony exemplifies the utter dearth of licensee competence and control.

* * *

Q. Now in connection with your election as President of Burbank Broadcasting Company, were you assigned any duties to perform in that role?
A. No.
Q. Did you in fact do anything in the subsequent months as President of Burbank Broadcasting Corporation?
A. No.

[Tr. at 1781]

Such was the confusion that Castillo was not even aware of which company he headed. The transcript goes on to read:

MR. PEPPER: Wait, wait, wait a minute. He just said Burbank. It was George E. Cameron Communications Inc. The other is a partnership. It doesn't have officers or Directors.

BY MR. ZAUNER: (Resuming)

Q. Sir, your testimony with regard to election as President of Burbank Broadcasting Company, in fact was it George E. Cameron Communications Inc. that you were elected President of?
A. I imagine, whatever it was the election was for.
MR. PEPPER: In any event, I have so stipulated, counsel.

BY MR. ZAUNER: (Resuming)

Q. How long did you serve in the position of President, George E. Cameron Communications?
A. I really don't know, until it dissolved, I imagine. I don't know. *I may be still President for all I know. I don't know.* [*Id.*, at 1781–82 (emphasis added)]

ately "maintained a separate office for ownership . . . to not interfere with the professional people that we hired to run it." Tr. 1139.[7]

7. Although Commisision policy does not require the working integration of station owners into the day-to-day routine of station activities, it is to the licensee itself and not to its agents or employees to whom the Commission looks for baseline accountability. The licensed party must retain consistent and effective control over the station because "it is only by holding the licensee responsible that there can be any resonable assurance of station operation in the public interest." *Continental Broadcasting, Inc.*, 15 FCC 2d 120, 131, *aff'd sub nom. Continental Broadcasting, Inc.* v. *FCC*, 439 F.2d 580 (D.C. Cir.) *cert. denied*, 403 U.S. 905 (1971).[8] Looking to the licensee of KROQ for compliance with Commission rules and policies would have been futile indeed, however, inasmuch as the principals themselves testified that they had never troubled to familiarize themselves with the particular rules and policies applicable to federally licensed broadcast stations. Consequently, although all licensees are expressly admonished before operating a station to become knowledgeable about those rules and policies,[9] the licensee principals of KROQ evinced not the slightest inclination to do so. Representative of GECC's repeated admissions of systemic indifference is the hearing testimony of Michael Colicigno:

> Q. Were you aware then you were a partner of any other partner who was knowledgeable of the FCC's Rules and Regulations?
>
> A. None of the other partners ever were in broadcasting and did not know the strict procedures and rules that were laid down or were the rules of operation by the FCC. [Tr. at 1471][10]

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[7] *See also* Tr. at 1467, where another partner, Michael Colicigno, stated that "We had a kind of rule that none of the partners would mingle with the employees."

[8] The Commission has consistently enunciated this primary duty of direct licensee responsibility in the following manner:

> A broadcast licensee is a public trustee, entrusted with the use of a precious public resource in return for its agreement to adhere to limited conditions imposed by th[e] Commission. . . . From the first days of broadcast regulation, licensee control over the operation and management of their broadcast facilities has been central to the proper functioning of the regulatory scheme mandated by Congress and enforced by the Commission. Without licensee supervision of and control over the operation of their stations, the key element of the present system—accountability to the public and the Commission—would be lost. *Trustees of the University of Pennsylvania*, 69 FCC 2d 1394, 1396, (1978). *See also Eleven-Ten Broadcasting Corp. (KRLA)*, 32 FCC 706, 708 (1962), *recon. denied*, 33 FCC 92, *aff'd sub nom. Immaculate Conception Church of Los Angeles* v. *FCC* 320 F.2d 795 (D.C. Cir.), *cert. denied*, 375 U.S. 904 (1963), *Gaffney Broadcasting, Inc.*, 23 FCC 2d 912, 913 (1970); *KWK Radio, Inc.*, 34 FCC 1039 (1963) *aff'd* 337 F.2d 540 (D.C. Cir. 1964), *cert. denied*, 380 U.S. 910 (1964).

[9] *See, e.g., Broadcast Station Application Form 301*, Section 1, Instruction G.

[10] *See also* Tr. at 1516 where Colicigno stated that none of the station owners were looked to for familiarity with FCC rules: for that purpose GECC looked to Washington counsel (*id.*) and the station staff (id., at 1523).

Moreover, Kathleen Coldeway, who claims that she was either secretary or treasurer of the company (she does not remember which)[11] indicated that she had not read any of the Commission's rules or regulations. Additionally—to her knowledge—no other partner, officer, or director of the company had done so either. Tr. at 2181–2182. *See also* Testimony of Joe Gonsalves (Tr. 2305–2306) where he answered:

Q. Now during the time of your involvement with the stations, 1972 on, do you know if any of partners were specifically assigned the duty of—or responsibility of making sure that the station operated in accordance with FCC rules and regulations?

A. The only thing I heard—and I was never around the station—the one I had heard was managing was Gary Bookasta.

In response to a question concerning his familiarity with the Commission's rules respecting the requirements attending a station's public files, Gonsalves also stated: "I have no knowledge of anything the FCC has or does." Tr. at 2317.

8. As the foregoing illuminates, the principals of KROQ wholly disassociated themselves from licensee oversight of the station and failed to accept any meaningful responsibility for general compliance with pertinent federal regulatory requirements. This flagrant inattention to fundamental licensee responsibility is etched in the disarming testimony of GECC's president, Jack Gonsalves, who in reply to a series of questions regarding licensee responsibility deposed as follows:

Q. Now were you—did you ever review or read any FCC rules and regulations of any sort?

A. No, I don't recall I did.

Q. Did you read any summaries of FCC rules and regulations?

A. No.

Q. To your knowledge, was any other member of your partnership responsible for reading FCC rules and regulations or learning about them?

A. If they were responsible for doing it?

Q. Yes, to your knowledge.

A. I don't know if anyone had that responsibility or not. I don't recall, I imagine probably Gary Bookasta was doing it. [Tr. at 2364–2365]

Other GECC partners cumulatively confirmed that Bookasta, not the licensee, was the sole party expected to maintain compliance with Com-

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[11] Tr. at 2181.

mission standards. *See e.g.*, Testimony of Peter Prestininzi; Tr. at 2317, 2490, 2495. By their own testimony, therefore, not only were the principals shown to be "inept" or "careless" in their stewardship of the station, they were exposed as studiously oblivious to their foremost licensed duties.

9. Additional evidence of the fact that GECC was unequal to its responsibilities and of its innate ineptitude permeates this exhaustive record. For instance, from the time GECC acquired KROQ in 1972 until its financial crisis boiled over in the summer of 1973, the licensed principals never even met to discuss the faltering status of the station. *See* Tr. at 2364. Only Bookasta, to whom the licensee gave *carte blanche*, had any knowledge of, and supervision over, the activities of KROQ. Accordingly, without consulting the licensee principals at all, Bookasta hired all personnel, negotiated sales contracts, received all periodic reports from other management personnel, signed payroll checks, and even selected all programming. Tr. 1147, 1418–1420, 1423–1424, 1475–1476, 1569, 1958, 2053, 2408, 2412, 2429, 2423–2433. He also handled the station's other business affairs such as dealing with legal counsel, making payments on the station's debts, and preparing the station's financial statements. Tr. 2401–2402, 2408–2409, 2438–2440, 1492–1493, 1516. The licensee principals, on the other hand, plainly had no purposeful input whatever in the station's activities.

10. It is against this backdrop of structural licensee estrangement that GECC's performance record as a station operator is empirically assessed. Thus, after over the station in September 1972 and placing exclusive authority over the station's activities in the hands of Bookasta and his staff, KROQ borrowed $200,000 to promote a November 1972 rock concert with each GECC principal personally guaranteeing the loan note. The concert was a commercial failure and Kenneth J. Roberts, a talent agent involved with the concert, was tapped by Bookasta for a loan of another $100,000 to help offset for the losses occasioned to the station. I.D., paras. 14, 15. In the ensuing months, the station's fortunes continued to degrade and, by March of 1973, Bookasta arranged to borrow up to another $500,000 from Roberts in exchange for an option allowing Roberts to acquire 25% of the licensee's equity. Tr. 1162. Briefly thereafter, and as a combined result of liberal spending and spiralling debt, Bookasta informed the GECC principals by letter of June 13, 1973 that the economic condition of the station was perilous. Specifically, the station's books as of that date showed that KROQ had $590,000 in current liabilities, all due or past due; it had fixed monthly expenses of $113,100; and, it had monthly income of only $60,000 $40,000 in cash and $20,000 in trade-outs. It also had additional outstanding debt obligations of approximately $1,000,000. I.D., para. 16. So apprised, the principals of GECC met on June 16, 1973 and urgently decided to dissolve the extant GECC partnership and to

reform the licensee as a corporation in a moratory effort to restrict the personal liabilities of the principals. At the time meeting, GECC elected an eleven-member corporate board of directors, giving its newest benefactor, Kenneth Roberts (to whom it then owed in excess of a half million dollars), three of the ten total directional votes. But, by the following month, Roberts was constrained to lend the station still another $100,000 because KROQ, current liabilities had soared again to over $700,000. Even so, by October of that same year, KROQ defaulted on its principal loan to Bank of America[12] and its current debt had reached nearly $800,000.[13]

11. At an ownership meeting held on October 11, 1973 to discuss the pending crisis at the station, the GECC principals were updated on the desperate financial situation and were also admonished that they were vulnerable for the prodigious debts of GECC, *collectively and individually.* Upon notification of their potential personal liabilities, the licensee organization disintegrated, there and then, into acrimony and recriminations between and amongst various GECC principals. In fact, three principals (including GECC's vice president, its secretary and its treasurer) walked out altogether in return for what they thought at the time was an agreement for complete indemnification.[14] The ten remaining principals, striving zealously to absolve themselves from any further risk attributable to the operations of KROQ, refused thereafter to take active part in either the management of the station or to contribute additionally to the critical financial needs of KROQ. By so doing, the remaining principals thought to obviate the legal inference that they were anything more than "limited" investors having no direct responsibility for the station's liabilities. At no time immediately relevant herein does it appear that they seriously proposed selling the station or voluntarily remitting the license, either of which might have delimited their future personal liability and placed the station in the hands of more committed owners.

12. Following the October 11, 1973 meeting, GECC collapsed into abject disarray and any semblance of coherent licensee control over KROQ essentially evaporated. Although one of the remaining partners, Kathleen Coldeway, believes that she may have been "acting president" for some of that period of time, she testified that:

Q. When did you become acting president?

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[12] The main financing for the purchase of the station from the Cameron estate was a loan of $2,200,000 from the Bank of America. I.D., para. 9.

[13] Notwithstanding these catastrophic developments, the KROQ principals simultaneously pursued their prosecution of an application for an FM station in nearby Pasadena. I.D., *Findings*, para. 21 n.11. This matter is independently addressed *infra*, paras. 40–43, under the "Misrepresentation" issue.

[14] I.D., para. 20.

A. I wasn't acting president for very long. I can't remember the details of it, but it was just for a short length of time.

Q. Excuse me, does looking at the date of the cover letter help you to refresh your recollection, April 9, 1976?

A. No, sir, it really doesn't. I just can't remember the details of the, me being elected president at that time.

Q. Well, was there a meeting at which time you were elected acting president?

A. I am sure there must have been. [Tr. 2174.]

According to the record, the station apparently floundered in that rudderless condition until June 14, 1974, when Kenneth Roberts was elected president. But, a month later, Roberts also resigned as president and as a director because the other feuding principals categorically refused to deal with each other.

13. Not only did the GECC principals refuse to interact, several of the defecting principals actually brought civil suit against the others to dissolve the company. They also advised their erstwhile associates of their intention to completely shut down KROQ so as to preclude further personal liability to themselves. This action was met by a countersuit by other GECC principals to enjoin the threatened station shutdown. Armed guards were hired to keep the defecting principals from effectuating their intention to permanently terminate KROQ's broadcasting operations. Nonetheless, the station's ongoing broadcast operations were ephemeral. On July 29, 1974, the employees of KROQ walked out on strike and shut down the station when their pay either stopped or their salary checks were returned for insufficient funds. Contributions to the union pension fund were also discontinued by GECC in violation of the employment contract. After that occurred, the defecting GECC principals physically entered the station and changed the locks in an attempt to ensure that the station did not return to the air. The other principals responded by changing the locks once again. While the station was silent, several of the GECC principals filed a renewal application with the Commission, simply deleting the names of those licensee principals they no longer considered "general partners." In response, Kathleen Coldeway wrote to the Commission on September 6, 1974 and alleged that the contending principals had filed an unauthorized renewal application and false ownership forms, and she accused the GECC principals who had filed the renewal materials of attempting to improperly commandeer control of the station. Contemporaneous with these shenanigans, law-

suits by creditors in the amount of nearly $6 million were filed against the licensee principals (including a suit by Kenneth Roberts).[15]

14. As a result of these progressive cataclysms, KROQ did not recommence broadcasting in 1974 or in 1975. Indeed, the station remained fallow for approximately two years following the described impasse and did not resume operations until the summer of 1976 after Kenneth Roberts consolidated and purchased all of the station's outstanding debts. The controlling principals of GECC, having been indemnified by Roberts, thereafter optioned off their remaining interests and refused to contribute further to the station. Accordingly, further support for the station came from Roberts who thence became, for all tacit purposes, the sole party in interest in the future of KROQ. The final abdication of the license by the remaining GECC principals was, by that point, effectively absolute.[16]

15. The ALJ further detailed in full the evidence of the continuing ineptitude of GECC and its neglect of the station from 1976 forward. For example, by Memorandum Opinion and Order released March 10, 1976, the Commission determined that the licensee appeared to be incapable of prosecuting its renewal application and it was compelled to order that if no acceptable renewal application was filed within 60 days, KROQ's license would be cancelled and the frequency vacated (58 FCC 2d 622 (1976)).[17] Finally, on April 12, 1976, a renewal application was filed by GECC.

16. Several months after its dilatory filing for renewal, KROQ returned to the air, having been silent for nearly two years. Kenneth Roberts, who by that time had judgments against the other thirteen GECC principals in the amount of $6.5 million (I.D., *Findings*, para. 33) and other options to purchase additional interests in the station, unilaterally provided the finances which allowed KROQ to resume broadcasting operations as well as other operating finances from that point forward (*id.*). He also rehired Bookasta who later quit because his salary was not being paid. Tr. 2549–50. Bookasta was later reemployed again, but was subsequently replaced in 1978 as general manager by Patrick Welsh, who had worked for Kenneth Roberts in other capacities for the previous fifteen years. I.D., para. 37. Hired as station manager was Jose Molina to whom—unbeknownst to the licensee—Bookasta had sold an option to purchase

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[15] At one point in 1975, Kenneth Roberts—who then held options to acquire 25% of GECC—also filed a competing application in the name of a wholly-owned corporation d/b/a KRE Broadcasting, Inc. which sought a mutually exclusive grant of the construction permit for the frequency of KROQ. This application, in competition with GECC, was later withdrawn.

[16] As to Roberts' *de facto* assumption of the reins of KROQ after these events, *see* paras. 29-39, *infra* under the issue of "Transfer of Control."

[17] KROQ's renewal application had been sat previously for hearing. *See Designation Order*, 56 FCC 2d 752 (1975).

the station outright. Molina allegedly paid Bookasta $12,000 down in cash to be applied to a $2 million total purchase price (*id.*). However, Roberts later advised Molina that Bookasta (whom Molina thought owned the station) had no legal authority to sell the station to him. Bookasta left the country, but the station soon began receiving bills from Europe for debts incurred by Bookasta who apparently bore a letter of credit from GECC with the purported signature of Kathleen Coldeway.[18] He was ultimately arrested in Ireland and incarcerated until Roberts went there and freed him.

17. Although Bookasta had no authority to sell KROQ to Jose Molina, Roberts and Castillo decided to sell him the station anyway. Molina, who claims to have invested approximately $200,000 of his own cash and equipment in the station even though he was not, and is not, a principal of GECC, now possesses an agreement to acquire the station from Kenneth Roberts *if* and *when* Roberts excercises *his* options to secure the remaining 51% of KROQ which he does not currently own. Molina, for his part, appears to consider the $200,000 he has already spent to be additional consideration towards the purchase of KROQ (id.).

18. *Summary.* Although other violations which corroboratively serve as conclusive indicia of GECC's ineptitude are specifically elaborated upon *infra*, and are incorporated by reference into our analysis of ineptitude, we are, at this juncture, addressing the discrete issue designated as follows:

> To determine whether carelessness, ineptness or disputes among the principals evidence an inability on the part of George E. Cameron Jr. Communications and Burbank Broadcasting Company to effectively exercise the responsibilities of a licensee of Station KROQ and KROQ(FM), respectively, affecting their basic and/or comparative qualifications.[19]

The standard inquiry under this particular issue is whether an applicant's conduct has revealed a "pattern of carelessness and inadvertence" on relevant matters of major significance. *See Edward G. Atsinger, III*, 29 FCC 2d 443, 447 (Rev.-Bd. 1971), citing *Folkways Broadcasting Co., Inc.*, 26 FCC 2d 75 (1970). As is vivid from the preceding discussion, and as reinforced by the plethora of infractions described hereinbelow, GECC was, and is, inherently unqualified to steward a licensed broadcast station or to be relied upon in any degree to discharge important regulatory responsibilities. Not only does the record demonstrate a pattern of carelessness and ineptitude in the operation of KROQ, it reflects sharply that the principals of GECC neglected from the first to marginally inform themselves of their legal responsibilities as licensees. Thereafter, it dis-

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[18] Coldeway had previously given Bookasta her power of attorney.

[19] 67 FCC 2d 143, 148 (1977).

closes that the licensed owners segregated themselves from actual station performance along with their prime duty to maintain Commission standards in operating KROQ. Instead, the licensed individuals constituting the GECC entity focused their interest on the calamitous station only *after* its financial paroxysms in mid–1973. Subsequently, the controlling principals (assuming, *arguendo*, that there were ever licensed GECC principals in cognizable control of KROQ) showed no collective interest whatsoever in assuring that KROQ continued to maintain even token fidelity to its federal charter. Rather, the licensee principals preoccupied themselves exclusively in buffering themselves from the very responsibilities they had assumed in seeking and accepting their broadcasting privilege. The record projects conclusively that the GECC principals were either unwilling or unable to meet their financial or their other regulatory burdens in running the station. They ceased paying their employees and their taxes; they lost their equipment; they filed overlapping renewal applications in direct competition with one another for the very same station in which they were simultaneously co-owners; they ceased filing required ownership and financial reports with the Commission; they ignored technical standards; and, they ultimately abandoned total *de facto* control over KROQ to Kenneth Roberts without the required Commission approval for the sole purpose of trying to put even greater distance between themselves and the station than they had initially. In sum, to hold that GECC was inept or careless is to engage, somewhat, in genteel understatement. By its willful and pervasive neglect, GECC has proven itself patently unreliable as a licensee. The KROQ record—such as it is—furnishes definitive evidence that the valuable privilege of owning and operating a broadcast station was seriously misplaced. The licensee's deliberate abdication and the tangible consequences thereof warrant, at a minimum, a legal finding of "carelessness" in the purest etymological sense: the licensee was simply "without care." Accordingly, the fundamental unfitness of GECC for a renewal of the KROQ license upon a statutory public interest finding is manifest under this initial issue.

19. *Reporting Violations*. The ALJ devoted paragraphs 54–60 and 12–14 to Findings and Conclusions concerning whether the licensee complied with Sections 73.3615, 73.3613, and 1.65 of the Commission's Rules. So far as is pertinent here, Section 73.3615 (formerly Section 1.615) requires a licensee to report any change in its ownership and management within 30 days to the Commission on an Ownership Report (FCC Form 323) and Section 73.3613 (formerly Section 1.613) requires a licensee to file with the Commission within 30 days of executive thereof copies of all contracts, instruments or documents relating to the present or future ownership or control of the licensee. Additionally, Section 1.65 requires an applicant to amend its pending application within 30 days whenever the information

furnished therein is no longer substantially accurate and complete in all significant respects, or whenever there has been a substantial change as to any other matter which may be of decisional significance.

20. The ALJ found that there were "numerous" instances in which the licensee failed to comply with the above rules. These included the failure to report (i) changes in officers, (ii) grants of options obtained by Roberts from various partners to acquire their interests in BBC, and (iii) a grant by three of the BBC partners of their powers of attorney in station matters to Gary Bookasta, as well as the untimely filing of a transfer of an interest in BBC from one principal to another as a result of a divorce settlement and a lawsuit by two partners seeking dissolution of BBC. Moreover, as an illustration of GECC's complete neglect of its reporting responsibilities, it did not even file the station's Annual Financial Reports (FCC Form 324) during the years 1974 through 1978.[20] I.D., *Findings*, paras. 56–60. The ALJ noted that the licensee's failure to file timely reports hampered the Commission's efforts to deal with the licensee for the period when the stations were silent and concluded that the violations were sufficiently serious in the context of this proceeding to warrant disqualification. GECC excepts to its disqualification under this issue, arguing that the scope of the designated issues does not include the alleged reporting violations, that the record evidence fails to establish that the above matters were not reported, that the transactions did not have to be reported, and that the failure to report, if it occurred, was not a material violation of the rules.

21. We will deny GECC's exceptions and affirm the ALJ's conclusion. It is significant that no mitigating explanations whatsoever were proferred for the reporting derelictions. Further, the unavoidable inference is that these violations also resulted from GECC's gross inattentiveness to its licensee obligations and responsibilities discussed, *supra*, and are further evidence of the general unreliability of the licensee. Turning to its specific exceptions, GECC's initial argument that some alleged reporting violations are outside the scope of the issues because certain occurrences are not specifically mentioned in the various Designation Orders in this proceeding is incorrect. It is well established that evidence relevant to the designated issues will not be excluded merely because it was not included among the illustrative instances which warranted the hearing. *See Chronicle Broadcasting Co.*, 20 FCC 2d 33, 39 n.11, 17 RR 2d 663, 672 n.11 (1969); *Clay Frank Huntington*, 61 FCC 2d 123, 38 RR 2d 838 (Rev. Bd. 1976). Moreover, GECC's contention that there has been a failure of proof

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[20] The elimination of the annual financial reporting requirement (*see* Report and Order, FCC 82–127, released March 22, 1982) is not a mitigating factor here since the gravamen of the issue designated is the licensee's propensity to comply with applicable Commission rules and regulations. *See, e.g., Simon Geller*, 90 FCC 2d 250 (1982), where an ascertainment issue was resolved adversely against the applicant even *after* the formal ascertainment requirements were abolished.

regarding the reporting issues is erroneous. For example, there is irrefutable record evidence to support the ALJ's findings that important matters such as Annual Financial Reports were not filed over a five-year period. *See* Broadcast Bureau Exhs. 16 and 17, 26, 138 and 139, and 146; Tr. 2020.[21] Commission precedent establishes that flagrant and repeated omissions of this nature are, in themselves, sufficient to warrant nonrenewal. *See John C. Roach*, 20 FCC 2d 255 (1969). Finally, we reject GECC's arguments that some omitted documents were not required to be filed or, if so, were not material. As correctly noted by San Marco, the rules in question clearly show that the Commission has a broad interest in documents affecting ownership and control of any station it licenses; and, the claim that such failures to report are not material is directly belied by the Commission's Designation Order pointedly noting that the Commission's staff had been unable to deal with the licensee for a fourteen-month period because of these reporting omissions. *See* 56 FCC 2d at 755. There is no evidence to contradict or mitigate these violations and disqualification under the issue is appropriate because of the licensee's repeated failure to fulfill its fundamental obligation of allowing the Commission to know with whom and with what it was dealing. In fulfilling its *own* statutory role, the Commission needs the data it compels licensees to file. These numerous and repeated reporting violations indicate decisively that GECC is not to be relied upon to execute its routine regulatory responsibilities.

22. *Technical Violations*. The ALJ's findings and conclusions under this issue are set forth in paragraphs 69–77 and 21–23 of the Initial Decision. Briefly, the ALJ found that technical shortcomings were rampant at KROQ as evidenced by the station's receipt of ten Official Notices of Violations between August 1976 and April 1979 for a variety of technical violations and a $2,000 forfeiture assessed against the licensee for repeated rule violations.

23. Specifically, the violations cited in the Notices included, *inter alia*, failure to make timely and required operating and maintenance log entries; failure to notify or obtain approval before moving the main studio outside of the community of license; failure to have a properly licensed operator in charge of the transmitter at all times; failure to comply with

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[21] GECC asserts that the other parties have failed to carry their burden of proof on the reporting issues and, citing *Salem Television Co.*, 38 FCC 253, 255–56 (1965), contends that there is insufficient record evidence to sustain these findings. However, based upon stipulation, testimonial evidence of GECC parties, and the absence of corresponding reports in Commission files, it is clear that required reports relating to ownership and control changes were not submitted. GECC, which bore the burden of proof under this issue, *See Designation Order*, 56 FCC 2d at 763, tendered no evidence whatsoever to demonstrate that the failures identified by the ALJ did not occur. *Salem*, where the alleged reporting failures turned on "the testimony of an employee of one of the adversary law firms" (38 FCC at 255), is not apposite here where substantial evidence of numerous reporting failures was not even challenged at hearing by GECC.

duplication of programming requirements; failure to make required tower light inspections; failure to take adequate measures with respect to transmitter power variance and antenna coupling networks; failure to maintain proper antenna input tower; failure to retain a record of proofs of performance and field intensity measurement data; failure to timely inspect the transmitter system; failure to maintain a main studio in the place where the station is located; failure to post station and operator licenses; failure to obtain approval for remote control authorization; failure to broadcast public notice of licensee obligations; failure to make available operating and maintenance logs; and failure to obtain remote control authorization. I.D., *Findings*, para. 70.

24. The ALJ further found that the licensee was advised by its own chief engineer that the station's transmitting equipment could not comply with Commission standards unless repairs or replacements occurred. The licensee allowed the violations to continue. I.D., *Conclusions*, para. 22. The ALJ also concluded that the technical violations were, in considerable part, attributable to the refusal of the principals to commit necessary funds to the station despite the Notices of Violations and admonitions from the station's own staff. He found, as well, that the technical violations, standing alone, would warrant disqualification. GECC challenges this conclusion in its exceptions, contending first that the Notices of Violations are inadmissible against the licensee because the Commission's inspections were performed without warrants; and, second, that even if the Notices are considered, an adverse finding is not supportable since the Initial Decision fails to discuss the licensee's responses to the Notices of Violations. Finally, GECC argues that the ALJ erroneously ignored the other sums of money committed by the principals to the operation of the station.

25. We firmly agree with the ALJ's resolution of this issue. And, that resolution strengthens our view of GECC's overall lack of licensee qualification. Turning to GECC's exceptions, we reject its initial argument that the Notices are inadmissible because of the nature of the inspection which preceded them. Section 73.1225(a) of the Commission's Rules, 47 CFR § 73.1225(a), requires licensees to make their stations available for inspection by Commission representatives during the stations' business hours, or at any time they are in operation. The Board has no power to review a Commission rule providing for warrantless inspections; only the Commission has that authority. *See Randall R. Gaines*, 72 FCC 2d 871, 878, 46 RR 2d 10, 16 (Rev. Bd. 1979). We do note in passing, however, that the Supreme Court has upheld legislation (similar to § 303 of the Communications Act) authorizing warrantless searches in federally regulated enterprises where the efficacy of the inspection could be frustrated by the prerequisite of a warrant and the inspections for compliance pose only a limited threat to the entrepreneur's expectation of privacy. *See*

*U.S.* v. *Biswell*, 406 U.S. 311 (1972). GECC voluntarily sought and accepted its license from the Commission under the condition that it comply with Commission regulations and it cannot now legitimately complain of Commission inspections which ensure such compliance. For our review purposes, therefore, we accord with the ALJ's ruling on admitting the Notices.

26. Nor does GECC's argument that the ALJ failed in the Initial Decision to elaborately discuss its responses to the Notices undermine the ALJ's conclusions on this issue in view of the unrebutted record evidence which conclusively proves the violations cited in the Notices. *See*, *e.g.*, Bureau Exhs. 242, 244, 245 and 246; *see also* Tr. 2216–2274, 3733–3782. Additionally, Darryl Wampler, an employee of KROQ in various engineering capacities since September 1977, testified that the stations were operating in violation of the Commission's Rules at the time of the challenged station inspections. Tr. 2221–2222. Wampler also testified that a proof of performance was not conducted *at any time* while he was the operating director of the operation. Tr. 2225. Similarly, Scott Mason, another GECC engineer since May 21, 1979, stated that he could find no evidence that a proof of performance had been performed at the station in the prior 10 years notwithstanding that such was mandatory every 14 months. Tr. 3479.[22] Although, apparently, a proof of engineering performance was finally done in 1980, Mason had previously advised GECC that a proof of performance could not be conducted prior thereto because the station totally lacked the necessary equipment. Tr. 3497–98.

27. Finally, and contrary to GECC's contention, the ALJ properly found that much of the state of disrepair of the station's equipment was due to the licensee's unwillingness to commit funds promptly to correct serious technical problems as they arose. Perhaps the best depiction of the situation is documented in a December 1977 memorandum prepared by GECC's Wampler:

> KROQ-AM and FM is hanging on by a thread, and a very thin one at that. There is much money needed to bring the stations back up to legal specifications. . . . We have just received a Notice of Violation(s) by the FCC from their September inspection of the KROQ AM facilities. . . . This is going to cost a lot. We cannot operate in the emaciated condition that exists presently. I have done piles of equipment reports, proposals, engineering budgets, etc., but have seen absolutely no effort to do anything but keep it alive, barely. I have been with the stations since September 1976 and seen maybe $1,500 spent towards engineering, the technical operation of the radio station. The equipment is literally falling apart, what little of it there is. Presently, the FCC is moving in for the kill. . . . If your wishes are to keep the licenses of the radio station immediate financial action will be necessary. . . . The studios look nice, but the FCC doesn't care how the stations working surroundings look. What they care about is the things that no one has paid attention to, the technical operation of the radio station. [B/C Bur. Exh. 238.]

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[22] *See* 47 CFR § 73.254.

At the same time, however, the evidence showed that the station apparently spent $70,000 to $80,000 for carpeting to refurbish the station. Tr. 3235–3236. In any event, the large number of serious technical violations occuring over a considerable time span are sufficient unto themselves to deny renewal of license. *United Broadcasting Co., Inc.* v. *F.C.C.*, 565 F.2d 699 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1046 (1978) (technical violations alone are a sufficient reason for disqualification). Hence, we affirm the ALJ's disqualification of GECC on this issue.

28. *Public Inspection File.* Section 73.3536 (formerly § 1.526) of the Commission's Rules requires a commercial broadcast licensee to maintain for public inspection a local file containing specified material relating to its station. The ALJ found that KROQ's public file was incomplete from the time the station went back on the air in 1976 until September 1979 and that the principals of the licensee took no corrective action during this time period despite being alerted to the deficiencies. He concluded that the condition of the file was further evidence of the licensee's general disregard for Commission regulations—although not disqualifying in itself. I.D., *Findings*, paras. 62–63, *Conclusions*, para. 16. In its exceptions, GECC contends that no specific deficiencies have been proved on the record but that, in any event, no adverse findings should have been made against licensee since no intentional misconduct was established. We affirm the ALJ's resolution of this issue. The record sufficiently establishes that the station's public file was incomplete for a substantial period of time (Tr. 2016, 2551–54, 1740–41) and that the station owners were knowledgeable of that fact (Tr. 2017–18, 2555). In light thereof, as well as the inordinate amount of time taken to correct those deficiencies,[23] KROQ's public file violations are viewed as simply another product of the general disorder that characterized the station. While these particular violations are not singularly disqualifying, they do reinforce our overall view with respect to GECC's basic disqualification.

29. *Unauthorized Transfer of Control.* Section 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 310(d), provides in pertinent part that "[n]o . . . station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly . . . to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby." In determining whether a transfer of control has occurred within the meaning of the Act, the Commission looks beyond mere title or legal control and considers the totality of the circumstances to ascertain where actual control resides. *See Stereo Broadcasters, Inc.*, 55 FCC 2d 819, 821 (1975). The

[23] GECC was on notice as of 1975 that there were questions concerning its public file. *See Designation Order*, 56 FCC 2d 752, 755.

Commission stated as long ago as 1948 that an unauthorized transfer of control would be considered as a possible grounds for denial of applications for renewal of the station licenses of the offending licensees. *See Procedure on Transfer Assignment of Licenses*, 4 RR 2d 342 (1948). *See also Lorain Journal Co.* v. *F.C.C.*, 351 F.2d 824, 830 (D.C. Cir.), *cert. denied*, 383 U.S. 967 (1966).

30. The Initial Decision, which finds that a *de facto* transfer of control occurred without prior Commission approval, focuses on the relationship between Kenneth Roberts and KROQ. As noted, KROQ is licensed to GECC, a corporation wholly owned by BBC. BBC, in turn, is a general partnership originally comprised of fourteen individuals, none of whom was Roberts. Roberts' relevant relationship with KROQ commenced in November 1972 when he lent BBC $100,000, the initial installment of what presently became a $500,000 commitment. I.D., *Findings*, paras. 15, 41. In security, Roberts was given a promissory note or, at his election, an option to secure up to 25% of BBC's stock upon BBC's incorporation. *Id.* It was apparently his intention from the outset to acquire KROQ. Tr. 969–70.[24] At a GECC meeting, held on June 16, 1973, to discuss Station KROQ's financial crisis, Roberts—still a non-owner—was given the vote of three company directors because of his *potential* 25% interest in BBC even though he was not present at that meeting. I.D., *Findings*, para. 17. However, he did attend the next meeting held on October 11, 1973, and was again elected to the Board of Directors where he was appointed to three of the Board's eleven seats. I.D., *Findings*, paras. 19, 20. By that time as well, Roberts was furnishing the lion's share of funds for operation of KROQ. *Id.* He was actually elected president of GECC in June 1974, but resigned a month later after failing to bring the partners together to resolve KROQ's problems. I.D., *Findings*, para. 22. On July 29, 1974, KROQ went off the air following a labor dispute and twenty-six law suits were then filed against the BBC partners by creditors, including a suit by Roberts whose combined claims by then approximated 6 million dollars. I.D.. *Findings*, para. 26.

31. On April 30, 1975, with KROQ still off the air, Roberts reached an agreement with the owners of the station whereby they agreed to cede their interests to him in exchange for his offer to indemnify them for their liabilities. That agreement also called for Roberts to pay the operating costs of the station and to manage it (under the putative supervision of the partners) pending the formal assignment of the licensee to him. A copy of that 1975 agreement was submitted to the Commission for its approval. I.D., *Findings*, paras. 29, 41. By letter dated June 27, 1975, the Chief of the Broadcast Bureau sharply rejected the agreement on the grounds that its implementation "would appear to constitute a premature assump-

[24] Roberts testified as follows:

tion of control [contrary to Section 310(d) of the Act.]" *Id.* Shortly thereafter, on November 21, 1975, GECC's renewal application was designated for hearing (along with the mutually exclusive application of San Marco for KROQ–FM). *Designation Order,* 56 FCC 2d 752 (1975). During the 1975–76 period, Roberts unilaterally negotiated with his fellow creditors and purchased their claims at discount. He was also assigned their claims against the GECC principals and, by mid–1976, Roberts had consolidated nearly all of the outstanding claims against the company. I.D., *Findings,* para. 33. In June 1976, both stations resumed operations after Roberts advanced sufficient funds to cover some basic operating and ancillary costs. I.D., *Findings,* para. 34.

32. By letter dated September 7, 1977, GECC informed the Commission that Roberts had acquired outright the ownership interests of four GECC principals, thus giving him a 38% *de jure* interest in KROQ. I.D., *Findings,* para. 48. In that connection, prior Commission approval was not obtained *before* the ownership change, notwithstanding that Section 73.3615(a)(2)(i) of the Commission's Rules expressly requires such agency consent.[25] In October 1977, Roberts and his successor as president of GECC, Dr. Castillo, appointed Kevin McKeown acting general manager of KROQ. Mr. McKeown, who served in this position until February 1978, reported directly to Roberts on financial matters and, allegedly, to Dr. Castillo on policy matters. I.D., *Findings,* para. 36. Mr. Roberts and Dr. Castillo met with one another at least 3 or 4 times a week on station matters. Tr. 1670–71. In August 1978, Patrick Welsh, a long-time business associate of Roberts and manager of one of his other companies, was brought in to be general manager of the station. I.D., *Findings,* para. 50. He, too, reported to Roberts on financial matters, at least beginning in November 1979. Tr. 3283–84. During October and November 1978, Roberts acquired irrevocable options on the ownership interests of all but one of the remaining KROQ principals, including the interest of the then-president, Dr. Castillo (I.D., *Findings,* para. 49) and on November 6, 1979, replaced Dr. Castillo as both president of GECC and as managing partner of BBC. I.D., *Findings,* paras. 51, 52. Roberts also acquired the *de jure* interest of another principal in July 1980, raising his total interest to 49%. I.D., *Findings,* para. 53. If KROQ's renewal application is granted, Roberts will exercise the options he holds and, upon Commission approval of the transfer to him, would own essentially 100%.

33. Of record, therefore, Roberts holds a minority (49%) interest in BBC and options to increase his interests to nearly 100%. He is the managing partner of BBC and president of GECC. He is also the major

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[25] Indeed, the record shows that applications (FCC Form 316) seeking Commission approval of the ownership changes were withdrawn after the licensees unsuccessfully argued that the rule is "unfair." BBC/GECC Exh. 89.

creditor, holding judgments against other principals which, if exercised, would financially cripple them. Roberts' long-time subaltern, Patrick Welsh, is the general manager of KROQ. In view of this total dominance, the ALJ found Roberts to have *de facto* control. I.D. *Findings*, para. 9. While recognizing that an unauthorized transfer of control need not always be disqualifying, the ALJ believed that disqualification was warranted here, in large part, because the parties had followed a course of action virtually identical to that explicitly disapproved in the Commission's warning letter to GECC and had allowed "the centralization of authority in Roberts without Commission consent." I.D., *Findings*, para. 11. In its exceptions, GECC, supported by Roberts, contends that the alleged transfer of control to Roberts is beyond the scope of the issue since Roberts' activities, *per se*, are not in the *Designation Order*. They further contend that the record evidence fails, in any event, to establish that a transfer of control to Roberts has occurred. And, finally, that disqualification here is not justified under prior Commission precedent.

34. We uphold the ALJ's resolution of this issue. GECC and Roberts are frivolous in their claim that the "Transfer of Control" issue does not encompass Roberts' activities. As noted in para. 21, *supra*, evidence relevant to a designated issue will not be excluded merely because it was not included among the specific examples cited in necessitating a factual hearing. *See Chronicle Broadcasting Co., supra*. Moreover, in the 1977 [Re] *Designation Order* in this very proceeding (67 FCC 2d 143), the licensees were placed on specific notice that the control issue was sufficiently broad to include post-designation matters. *Id.*, at 145 n.4. Roberts himself expressly adverted to the control issue as encompassing his potential control over the stations.[26] Further, the ALJ, who has procedural authority to clarify the issues (*see Daily Telegraph Printing Co.*, 20 FCC 2d 976 (Rev. Bd. 1969)), ruled early in this proceeding that the issue necessarily included Roberts and he particularly afforded the parties an adequate opportunity to prepare their case out of an abundance of caution that the understanding of the scope of the issue may have been somehow unclear prior to his ruling. Tr. 659. Thus, the parties were squarely on notice of the scope of the issue. No unfair surprise occurred and nobody's right to adequate notice was injured. Roberts' relationship to KROQ was always implicit and obviously unavoidable under any ownership control issue designated against GECC.[27]

35. The facts set forth by the ALJ and in the record demonstrate convincingly that through his financial position, both as the sole provider of KROQ's funds and as the sole holder of large judgments against the

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[26] *Petition to Intervene of Kenneth Roberts*, filed August 3, 1977, at p. 9.

[27] GECC challenges various evidentiary rulings as irrelevant on the grounds that Roberts' activities are not in issue. In view of our discussion above, those exceptions are rejected.

majority principals, Roberts could effectively preclude any independent action by the other principals. In his role as managing partner, Roberts also had practical and ultimate working control over the station, particularly when these facts are coupled with his option rights to acquire virtually 100% of KROQ from the remaining partners. The instances pointed out by GECC as intending to show that Roberts never participated in the day-to-day operation and control of the station are trivial and in no way offset the other factors affirming Roberts' de facto control. Furthermore, positive *de facto* control does not necessarily require personal involvement in every facet of day-to-day station operations. Given the existence and nature of the comprehensive option and indemnification agreements between Roberts and the other principals of GECC, and especially the conduct of the licensee since 1976, it is incontestably shown that Roberts, *and Roberts alone*, is the only individual with any meaningful interest in the fate of KROQ. The other *de jure* owners (and those alleged here by GECC to be the continuing *de facto* owners) are, and have been for some time, out of the picture completely for all relevant intents and purposes.

Q. And was it your intention in November of 1972 to at some time become an owner of the station KROQ?
A. Yes, it was.
Q. And that was your intention at the outset?
A. Yes.
Q. . . . [I]s it your testimony that in November 1972, it was your intent to acquire both the AM and the FM, KROQ-AM and FM?
A. The AM, the FM and KMPX in San Francisco. [Tr. 969–70]

36. Accordingly, GECC's argument that the record negates the assumption that Roberts could control the KROQ principals solely via his financial position is rejected. While GECC cites testimony for the proposition that Roberts never asked the principals to do anything contrary to the station's best interests, such testimony is irrelevant. Irrelevant also is Roberts' claim that he had no "motive" to seek control in an unauthorized manner. As pointed out by San Marco,[28] once KROQ's application was designated for hearing in 1975 on basic qualifying issues, there was little likelihood that the Commission would approve the sale of the station because it is the Commission's general policy not to permit an assignment of license unless there has been a determination that the licensee is qualified to hold its authorization. *See RKO General, Inc.*, 82 FCC 2d 291, 300 (1980). And the Commission's "distress sale" policy, which permits sale of broadcast facilities at reduced prices to minorities prior to hearing, was rendered inapplicable in this case when San Marco's competing application was designated for hearing. *See Clarification of Distress Sale*

[28] Reply Brief, at pp. 9–10.

*Policy,* FCC 78–725, 44 RR 2d 479, 480 n.3 (1978). Thus, Roberts' only course of action (other than to take unauthorized control of the station) was to await termination of this proceeding and then to acquire KROQ in the event that GECC prevailed. Finally, we reject Roberts' implicit assertion that misrepresentations and immediate financial gains must always be evident to take action on an unauthorized transfer. In *Stereo Broadcasters, Inc., supra,* 55 FCC 2d at 821, the Commission opined:

> It has been stated many times that *the Commission is not bound by any exact formula in its determination of whether control of a broadcast licensee has been transferred in violation of section 310[d] of the Communications Act.* Indeed, the Act does not spell out a formula which shall govern in such cases. The ascertainment of control in most instances must of necessity transcend formulas, for it involves an issue of fact which must be resolved by the special circumstances presented. [Emphasis added]

Hence, we disagree with the contention that disqualification here is not supported by Commission precedent.

37. Despite the Commission's unambiguous language in *Stereo Broadcasters,* both GECC and Roberts erroneously maintain that they should not be disqualified because the facts in this proceeding are similar to *Deer Lodge Broadcasting, Inc.,* 86 FCC 2d 1066 (1981). There, the Commission did not deny renewal even though it found that the station license had been transferred *de facto* for a five-month period without Commission consent by virtue of operational activities taken pursuant to a lease and sales agreement. Invoking *Deer Lodge,* GECC claims here that there is no pattern of active concealment or deliberate misrepresentation. Roberts also asserts that there are "mitigating factors" which offset the negative effect of any unauthorized transfer and that Roberts actually rendered a public interest service by singularly returning the station to the air.

38. Exceptors' reliance on *Deer Lodge* is critically misplaced. First, the licensee in this proceeding intentionally ignored the warning of the Chief of the Broadcast Bureau in his letter of July 27, 1975 that the financial arrangments between Roberts and the BBC partners then proposed—and now effectively implemented—would constitute an illegal transfer of *de facto* control. In *Stereo Broadcasters,* the Commission specifically distinguished Deer Lodge and relied upon the fact that "[the *Deer Lodge* parties] were not fully and explicitly on notice that [their action] constitutes an unauthorized manner of control. . . ." 87 FCC 2d at 117 n.60. Second, the Commission found in *Deer Lodge* that the licensee had not intended to surrender as much control as he did. 86 FCC 2d at 1098. Here, the controlling principals avidly desired that Roberts assume their insuperable burdens and willingly surrendered their control to him despite a clear Commission warning that such conduct might be actionable. Third, the *Deer Lodge* licensee attempted to regain control of the station on his own volition even before the Commission took any action. *Id.* at

1097. No such evidence is, of course, present in this case. Thus, GECC's contention that there was no pattern of active concealment or deliberate misrepresentation here does not place it within the factual circumstances of *Deer Lodge*.[29] And, finally, the fact that many of GECC's actions stemmed from their early financial difficulties does not serve as a basis for mitigation, nor does Roberts' personal role in placing the station on the air. Although the Commission indicated to KROQ its interest in getting the station back on the air as promptly as possible, it profoundly did not intend that GECC violate the Communications Act to do so. And GECC was so warned.

39. The ALJ's finding of disqualification is, therefore, fully warranted. The licensee was cautioned in 1975 that its proposed centralization in Roberts would constitute a premature assumption of control in direct contravention of the Communications Act. Yet GECC proceeded, *sub-silentio*, to give Roberts such control in spite thereof. Similarly, GECC omitted to comply with Section 73.3615(a)(2)(1) of the Commission's Rules requiring Commission approval prior to the change in its ownership when it increased Roberts' interests to 49%. Finally, they elected Roberts as managing partner of BBC and president of GECC without seeking Commission advice as to whether such action conflicted with the Bureau's warning about granting premature control to Roberts.[30] In view of the licensee's total conduct in the matter of ownership control, we conclude that GECC is not qualified to remain a Commission licensee. *See Stereo Broadcasters, Inc.*, 87 FCC 2d 87 (1981).

*Misrepresentation*

40. In April 1973, the principals of GECC (under the aegis of the parent company, BBC) filed an application for approval of the assignment to it of KPPC-FM (licensed to the National Science Network).[31] The financial balance sheet required by the Commission of all applicants soliciting a station submitted with the application on behalf of BBC indicated total assets of $5,257,272.90 and total liabilities of only $1,982,500, leaving a net balance of $3,274,772.90. Bur. Exh. 15. The solid economic picture

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[29] *Blue Ribbon Broadcasting, Inc.*, FCC 82R-42, released July 27, 1982, 90 FCC 2d 1023, where the Review Board relied in part on the lack of concealment of misrepresentation in refusing to revoke a license after finding that a fleeting or technical *de facto* unauthorized transfer of control had occurred is also greatly distinguishable from the facts in this proceeding. Significantly, in *Blue Ribbon* the questionable activities at issue occurred *after* formal Commission approval of the transfer and the new owners.

[30] The Commission has cautioned that uncertainty on the part of the licensee or counsel as to the legal consequences of a transfer of interests in a licensee is no excuse for failure to comply with the provisions of Section 310(d) of the Act. *See Procedure on Transfer and Assignment, supra*, 4 RR at 343.

[31] The station later became KROQ-FM and its renewal application was designated for consolidated hearing with that of KROQ-AM, 67 FCC 2d 143 (1977), but is not now before the Board. *See* para. 1, *supra*.

portrayed by the tendered BBC balance sheet was, of course, wholly illusory and in extreme contrast to the deep financial decline being experienced by the applicants at that moment and during the ensuing 9-month pendency of its FM application. The misleading balance sheet depiction is technically explainable, however, because listed prominently as the largest BBC asset was a demand note valued at $2,655,563 from its alter ego, GECC. The asset portion of the application balance sheet was further inflated by the listing of receivable advances of $692,826.90 to GECC from BBC. Nowhere, and at no time prior to the Commission's unwitting grant of the FM application in October of 1973, did the applicants convey to the Commission that GECC—the reservoir of the purported financial strength—was, itself, deeply insolvent as a consequence of the spiralling liabilities engulfing KROQ. As summarized by the ALJ, the *actual* financial circumstances during the relevant period were as follows (I.D., *Findings*, para. 67):

> During the month of April 1973, GECC had a net loss before taxes of approximately $23,000. For the five months ending April 1973, GECC had suffered a cumulative loss of nearly $400,000 (Bureau Ex. 200). For the nine months ending August 1973, GECC's total assets were under $1 million while its total liabilties exceeded $3.4 million (Bureau Ex. 207). By December 1973, GECC's debts, less possible discounts, totalled over $4.7 million (Bureau Ex. 209). Among these debts was $290,000 owed the Internal Revenue Service for monies withheld from employees' salaries for taxes, but never paid to IRS.

41. Moreover, the months during which the FM application was awaiting processing by the Commission directly coincided with the turbulent period of general licensee upheavel described in greater depth in preceding portions of this decision (*see* paras. 10–14, *supra*). Thus, by the close of August 1973, the principals of KROQ were painfully aware of the negligible possibility that GECC could effectuate the financial commitments specified in the balance sheet attending the FM application. Indeed, as noted previously, the GECC principals were then so paralyzed by massive liabilities that they refused to commit more funds to their own faltering AM station. Still they continued to seek the FM station despite the additional financial commitment connected therewith. In view, then, of the glaring disparity between the actual financial condition of GECC (as summarized above by the ALJ) and the sanguine condition intimated in the watered balance sheet on file with the Commission, the ALJ found that the failure of the principals to inform the Commission of its crumbling economic capabilities (as required by Section 1.65 of the Rules, 47 CFR § 1.65) constituted culpable misrepresentation.

42. GECC argues that no misrepresentation occurred because (i) the submitted BBC balance sheet was correct from a strict accounting standpoint; (ii) the Commission was advised in GECC's 1972 annual financial report that KROQ had lost $888,024 for the year 1972; and (iii) many liabilities were not shown in the balance sheet because they were, tech-

nically, debts of GECC, not BBC. We will find that the 1-page balance sheet submitted to the Commission was, casually speaking, "technically correct" and that, concordant with our reasoning in the recent case of *Fox River Broadcasting, Inc.*, 88 FCC 2d 1132 (Rev. Bd. 1982) (appeal pending, BC Docket Nos. 80–310, 80–312), no misrepresentation has occurred in the literal sense. Nevertheless, as the Board, the Commission, and the courts have held, a licensee (and license applicants as well) have an affirmative duty to go much beyond the barest "technical accuracy" and must candidly apprise the Commission of *all* circumstances which are likely to be of a decisional significance. *See, e.g., RKO General, Inc.*, 78 FCC 2d 1, 98 (1980) (submissions to the Commission "containing statements that are 'technically correct' but misleading as to the known facts" amount to lack of candor). In affirming the Commission's disqualification of the licensee in *RKO* solely on the grounds of lack of candor, the Court of Appeals stated:

> Section 1.65 of the Commission's Rules requires applicants to inform the Commission within thirty days whenever 'there has been a substantial change' regarding any matter that may be 'of decisional significance in a Commission proceeding involving the pending application.' 47 C.F.R. § 1.65 (1979). This requires that an applicant inform the Commission 'of all facts, whether requested in [renewal] Form 303 or not, that may be of decisional significance so that the Commission can make a realistic decision based on *all* relevant factors.' *Southern Broadcasting Co.*, 38 F.C.C. 2d 461, 464 (Rev. Bd. 1972) (emphasis in original).[32]

It further noted:

> In practical terms, this [licensee duty of complete candor] means that 'proceedings before the Commission are not private law suits,' and that the Commission does not function 'as an umpire blandly calling balls and strikes for adversaries appearing before it.' *See Scenic Hudson Preservation Conference* v. *FPC*, 354 F.2d 608, 620 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). The FCC has an affirmative obligation to license more than 10,000 radio and television stations in the public interest, each required to apply for renewal every three years. FCC Brief at 60 n.114. As a result, the Commission must rely heavily on the completeness and accuracy of the admissions made to it, and its applicants in turn have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate. This duty of candor is basic, and well known. *See, e.g., Sea Island Broadcasting Corp.* v. *FCC*, 627 F.2d 240, 243 (D.C. Cir.), *cert. denied*, 449 U.S. 834 (1980); *Golden Broadcasting Systems, Inc.*, 68 F.C.C. 2d at 1101–04.[33]

43. There is no plausible doubt had the Commission been accurately apprised during the pendency of the FM application of the financial and organizational paroxysms then afflicting the applicant, that—at the very least—grant of the FM application would have been deferred. More important, however, is the egregious lack of candor displayed by the

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[32] *RKO General, Inc.* v. *FCC*, 670 F.2d 215, 229 (1981).

[33] *Id.*, 670 F.2d at 232.

GECC principals who continued to prosecute their FM application at the very time that they were swiftly sinking under the pressure of their AM broadcast debt.[34] To have prosecuted an application for a *new* broadcast station (claiming approximately 3 million dollars in reliable balance sheet assets) while concurrently being unwilling or unable to financially support their existing station is shocking. Although the record does not determine whether (and to what extent) the inaugural and later expenditures made on behalf of the additional FM station might have contributed to the shutdown of KROQ-AM, the evidence of the FM station's shutdown shortly after their acquisition of the second station attests that the principals of GECC were no more ready, willing and able to financially support a new FM station—as implied in their then-pending application—than they were to comfortably sustain their existing broadcasting burden. Their failure to withdraw their FM application or to report their debilitated financial capabilities in the interval preceding the Commission's uninformed action on that application represents an inexcusable lack of candor which more than amply justifies the disqualifying holding of the ALJ under this issue.[35] Although we will not go so far, semantically, as to label the April 1973 balance sheet a "misrepresentation," GECC's maintenance of a filed financial picture it knew to be misleading during the prosecution of its FM application was grossly deceptive. On the basis of this stark lack of candor alone, GECC is unfit as a licensee.

*Comparative*

44. Royce is solely owned by Edward R. Stolz, II. He also owns Station KWOD-FM, Sacramento, California, where he currently is general manager, sales manager, and chief engineer. If successful, Stolz will move to Burbank and devote full-time to the Burbank facility as general manager and chief engineer. He will leave his current position with Station KWOD-FM and hire a general manager to operate the station. He is in all other respects qualified. I.D., *Findings*, paras. 87–90. We adopt those findings.

45. Conversely, and consistent with its systematic inability to comport with routine regulatory obligations, GECC proffered no timely evidence

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[34] GECC contends that there was no misleading conduct because it duly filed a 1972 annual financial report for KROQ as required. This contention is irrelevant for several reasons. First, it did not acquire KROQ until September of 1972 and it is not clear how the station's operating losses in that year related directly to the GECC principals. Second, the report does not reflect the reserve financial health, *vel non*, of the licensee organization. And, third, the station's losses apparently did not reach critical mass until after the report was filed in April of 1973. In any event, the filing of a prior year's financial report did not relieve the licensee/applicant of the duty to notify the Commission of its growing insolvency before the October 1973 grant of the application.

[35] In addition to *RKO General, Inc.*, *supra* (and cases cited therein), *see WADECO* v. *FCC*, 628 F.2d 122, 129 (D.C. Cir. 1980) where the court affirmed the disqualification of an applicant stating: "At a minimum, the Commission was fully justified in determining that [the applicant] failed to act with candor."As in this case, the disqualified applicant in *WADECO* failed to candidly advise the Commission that material it had submitted in connection with its financial showing was no longer reliable.

whatsoever under the standard comparative hearing issue.[36] Consequently, GECC is procedurally foreclosed from the conventional comparative analysis applied by the Commission in cases such as this. *See e.g., Cowles Broadcasting, Inc.*, 86 FCC 2d 993 (1981), *aff'd sub nom. Central Florida Enterprises, Inc.* v. *FCC*, No. 81–1795 (D.C. Cir. filed July 13, 1982). Accordingly, we are effectively bound, by operation of law, to hold for Royce in the matter of a dispositive comparative preference. While this result may appear passingly harsh, the absolute disqualification of GECC under the many other designated issues renders substantively moot the need for prolonged comparative evaluation. Obviously, even had GECC not legally defaulted in submitting a noticeable comparative showing, or had it somehow been here found contingently qualified, it could not seriously have hoped to prevail over almost any qualified competing applicant in the wake of the piteous track record of KROQ. It is, of course, upon that "track record" that renewal applicants must primarily run, *Office of Communications of the United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966); and this comparative principle governs renewal applicants facing a statutory challenge. *Citizens Communications Center* v. *FCC*, 447 F.2d 1201, 1211 (D.C. Cir. 1971). Whereas a broadcaster who has rendered substantial service is said to be entitled to a "renewal expectancy" as a comparative factor to be weighed in its favor, *Central Florida Enterprises, Inc.* v. *FCC*, *supra*, a record of disservice vitiates that expectancy and, in fact, weighs proportionately against the renewal applicant. *Simon Geller*, 90 FCC 2d 250, 271 (1982). When viewed in juxtaposition to KROQ's record in this proceeding, the deficiencies of the recent losing incumbent in *Simon Geller* seem relatively insignificant.[37] At no time, for example, in that case did the licensee simply close the station down for two years in spite of the alleged poor financial condition of Geller's station. *Id.*, at 262. Nor did Geller's record contain the harvest of other violations noted against GECC in this proceeding. *A fortiori*, the competing application of Royce herein promises a far superior hope of providing the community of Burbank with responsive and responsible radio service. The Royce application, then, unencumbered by the serious failures which attend the application of GECC, is the inevitable comparative choice over the application of the current licensee. Even had GECC been entitled administratively to a more formal comparative

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[36] For a definitive discussion of this matter, *see George E. Cameron Jr.*, 84 FCC 2d 345 (1981) (affirming ALJ rejection of GECC's untimely submission of its comparative case). The Commission having refused to permit the submission of the GECC exhibits, the Board will not consider that matter anew.

[37] Geller's fatal shortcomings in that case were a failure to adequately comply with the Commission's ascertainment requirements (requirements now abrogated, *Deregulation of Radio*, 84 FCC 2d 968, *recon. denied*, 87 FCC 2d 797 (1981), and "insufficient" non-entertainment programming keyed to community interests.

consideration, the end result would have likely been the same. The findings of fact and conclusions of law on the comparative issue set forth by the ALJ in paras. 87–90, and para. 27, respectively, of the *Initial Decision* are, therefore, affimed.

*Matters Involving Royce*

46. *False Certification.* By Memorandum Opinion and Order released April 17, 1979 (71 FCC 2d 461), the Commission specified an issue against Royce to determine whether its sole stockholder, Edward R. Stolz, II, certified to a false date of service with respect to an opposition filed by Royce to a motion to dismiss, and, if so, the effect on Royce's qualifications to be a Commission licensee. The certificate of service on the pleading was dated August 3, 1977, the date the pleading was due, but two affidavits attached thereto were dated August 4. The issue was added on GECC's claim that the certificate of service had been back-dated by Stolz to make it appear that the pleading was timely. The ALJ found in his Initial Decision that Stolz prepared the pleading and accompanying documents and dated the certificate of service on August 3, 1977, but completed the documents in final form too late that evening for notarization of the two affidavits. The following morning, the documents were notarized and the pleading placed in the mail. The ALJ also noted Stolz's testimony that he was unaware August 3 was the filing deadline. The ALJ concluded that the discrepancy between the certificate of service and the affidavits was nothing more than an innocent oversight by Stolz and that the erroneous date on the certificate had no effect on Royce's qualifications to be a licensee.

47. GECC concedes in its exceptions that there is no direct evidence to establish that Stolz intended to deceive the Commission. Nonetheless, it seeks disqualification of Royce under this issue, arguing that Stolz had a clear motive to falsify the certificate since the date affixed thereto was the deadline for submission of the pleading. Additionally, GECC contends Stolz's claim that he was unaware August 3 was the deadline because counsel was on vacation is belied by his claim that he was proceeding *pro se*. We will affirm the ALJ's treatment of this issue. A finding of misrepresentation requires evidence of an intention and a motive to deceive, mislead or conceal. *See New Continental Broadcasting Co.*, 88 FCC 2d 830, 837, 50 RR 2d 1117, 1124 (Rev. Bd. 1981). Such evidence is absent here. Mr. Stolz acknowledges that the date on the certificate was erroneous and there is no indication in the record that he made any effort to conceal or change the date of the pleading. He has adequately explained how the error arose. The bare existence of an error in a pleading without any indication that the licensee meant to deceive the Commission does not elevate the mistake to the level of an intentional misrepresentation. *Cf. Kaye-Smith Enterprises*, 71 FCC 2d 1402, 1415, 45 RR 2d 983, 995 (1979);

*Garrett, Andrews & Letizia, Inc.*, 86 FCC 2d 1180, 49 RR 2d 1007 (Rev. Bd. 1981). Furthermore, we do not perceive how the alleged discrepancy concerning the absence of counsel bears on Stolz's testimony that he was unaware of the deadline for filing the pleading.[38] GECC proffers only speculation and surmise. Misrepresentation findings require more substance. *See Fox River Broadcasting, Inc., supra.*

48. *Petition to Enlarge Issues.* GECC contends initially that the ALJ erred in refusing to add a reporting issue requested by Baker-Smith based on allegations that Royce failed to report an outstanding unsatisfied judgment in the amount of $5,465.31 against its principal, Edward Stolz, and that it failed to report Stolz's application for a new FM station in Palm Springs, California. *See* Memorandum Opinion and Order, FCC 79M–1506, released December 10, 1979. GECC argues that the judgment is material since it amounts of 12.6% of Royce's total assets. GECC further contends that the ALJ erred in not adding a misrepresentation issue requested by Baker-Smith for Stolz's failure to report the unsatisfied judgment in his Palm Springs application, which was both originally filed and resubmitted subsequent to the judgment. We will deny the requested issues since Royce has adequately explained the omissions and shown that they do not raise questions of decisional significance. Royce maintained in opposition to Baker-Smith's petition to enlarge issue, that its failure to report the judgment and the filing of the Palm Springs application were oversights and not motivated by any desire or intention to conceal anything from the Commission. Mr. Stolz was acting *pro se* at the time and claimed that it never occurred to him to amend the Burbank application to reflect the filing of the Palm Springs application. The Palm Springs application listed and referred to the pending Burbank application. Moreover, Royce pointed out that the judgment had no impact on its financial qualifications or on Stolz's Palm Springs application since the two proposals were to be financed by a $500,000 bank loan commitment guaranteed by Stolz's parents, and a $100,000 loan by Stolz's parents, respectively. With respect to the omission in the Palm Springs application, Royce pointed out that Stolz was unaware of the judgment until October 4, 1978, a month after he filed his Palm Springs application. When the Palm Springs application was resubmitted to the Commission on November 30, 1978, the application was

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[38] Pursuant to subpoena, former counsel for Royce testified that he had no recollection of informing Stolz as to the due date of the opposition to the motion to dismiss nor did his records indicate to the contrary. Tr. 5338, 5344. Objections to questions concerning whether Stolz requested the filing dates from counsel for other pleadings were sustained by the ALJ, which GECC now claims was error. The ALJ properly sustained the objections. The subpoena was issued for the limited purpose of ascertaining whether Stolz was aware of a particular filing deadline and thus had a motive for intentionally falsifying the certificate. Tr. 5330. Royce waived its attorney-client privilege for questioning on this point only. Tr. 5326, 5330. Thus, inquiry into Stolz's general relationship with former counsel is beyond the scope of the certification issue and the subpoena. Tr. 5212–13.

merely refiled in a ministerial fashion without any change by Royce. In view of Royce's explanations, and the absence of any indication in the pleadings that these statements cannot be accepted, the exceptions are denied. *See David B. Jordan*, 51 FCC 2d 940, 33 RR 2d 21 (Rev. Bd. 1975).

49. GECC also expects to the ALJ's failure to add certain issues it requested in post-hearing motions filed November 18, 1980 and January 28, 1981. GECC's initial motion (denied by Order, FCC 81M–217, released ineptness issues predicated on Royce's failure to amend its Burbank application to reflect its filing of an application for a new FM station in Desert Hot Springs, California on August 29, 1980. The latter application contained a representation that Stolz would serve as general manager and station manager, a claim which GECC argues is inconsistent with his commitment to serve as general manager at Burbank. GECC also alleges that Royce's reporting omission reflected adversely on Royce's financial qualifications. Additionally, GECC claimed that Royce failed to show in its original application the financial capacity to purchase its proposed transmitter site (the present KROQ site). We have examined the pleadings and find no basis for overturning the ALJ's ruling. Royce's explanation for the failure to amend, *i.e.*, inadvertence, is credible since we perceive no motive to conceal the filing of the Desert Hot Springs application in view of the fact that the filing is listed on the Commission's published cut-off list. And, the Desert Hot Springs application reported the existence of the Burbank application, which lends credence that the omission was inadvertent. *See David Jordan, supra.* Moreover, we disagree that the Desert Hot Springs application had any adverse financial impact on the Burbank application. Royce's opposition to the motion contained a financial statement of Stolz's parents (on whose guarantees the financing is based) demonstrating sufficient current assets to finance both the Burbank and Desert Hot Springs applications. Royce's alleged failure to demonstrate that it can purchase its proposed transmitter site is also no basis for a financial issue. In its Memorandum Opinion and Order, 71 FCC 2d 460, 466–68, the Commission created a presumption that the renewal applicant's site would be made available to Royce if Royce were a successful challenger and to this end Royce allocated $2,000 a month to lease the site. There is no indication in the pleadings that this amount is unreasonable on its face or otherwise insufficient. Without more specific support, an issue is not warranted. With respect to the claim of misrepresentation, we also find the allegations insufficient to justify an issue. In Royce's opposition pleading, Stolz reaffirmed his full-time commitment to the Burbank application, and noted that the extent of his integration at the proposed Desert Hot Springs facility would be subsequently determined in light of the outcome of the Burbank proceeding. Stolz stated further that in the event both applications were granted, he would direct the operation of the Desert Hot Springs station by daily telephone

contacts and periodic visits without impairing his commitment to Burbank. We find nothing inherently inconsistent in Stolz's plans and no evidence to suggest deliberate misrepresentation or concealment of material facts from the Commission. Thus, there is no basis for a misrepresentation issue. *See Garrett, Andrews & Letizia, supra.* Finally, we perceive no basis for an ineptness issue either since GECC utterly failed to show that Royce's conduct was deficient with respect to any relevant matters of major significance or that it disclosed a pattern of carelessness and inadvertence. *See Hammonton Aviation,* 58 FCC 2d 626, 36 RR 2d 1069 (Rev. Bd. 1976).

50. In its other motion to enlarge, filed January 28, 1981, GECC requested breach of fiduciary duty, misrepresentation, reporting, public file, financial, and ineptness issues against Royce. By Order, released June 29, 1981 (FCC 81M–1989), the ALJ summarily denied the issues on the grounds of timeliness, finding that the motion was filed late and that the allegations failed to raise a question of probable decisional significance and substantial public interest. *See* Section 1.229(b) and (c) of the Rules, 47 CFR § 1.229(b) and (c). The breach of duty issue was premised on the existence of a Notice of State Tax Lien filed by the state of California in the amount of $160.21 against Royce. Royce stated in its opposition that the lien arose over a good faith dispute between it and a state employment department auditor concerning the proper amount of unemployment withholding and was fully paid by Royce after judgment was entered. On these facts, no issue was warranted. The amount of money involved is insignificant and no showing was made by GECC that Royce engaged in any wrongdoing in incurring the lien. The requested misrepresentation issue was based on Royce's omission of two small unsatisfied judgments (one in the amount of $127.43 and the other for $56 plus costs) in its Desert Hot Springs application. Although Royce was remiss in failing to report the judgments in its application, the omissions were *de minimis* and there was no showing by GECC that would indicate that these violations were willful or significant. Enlargement of the issues in this respect was therefore properly denied. The allegations advanced to obtain a reporting issue involved GECC's claim that Royce failed to amend its Burbank application to report the existence of a number of liens and judgments recorded against it or its principal Stolz. Additionally, GECC sought a financial issue because of the liens and judgments. These allegations are too insignificant to warrant an issue. With the exception of the two minor judgments referred to above, all of the liens and judgments were satisfied in full immediately or shortly after they were entered. Moreover, there was no showing that the non-disclosures were deliberate or had any significant potential impact on the ultimate resolution of this proceeding.

51. Turning to the public file issue, GECC's request for an issue was grounded on allegations that certain items were missing from the public

file of Royce's Station KWOD(FM), Sacramento, California during an inspection visit by GECC's counsel and that Stolz refused to provide counsel with a copy of the original construction permit application for that station. We believe the ALJ properly denied the issue. The relevant facts are that on the second business day following the inspection, counsel for Royce informed GECC's counsel that he would be provided with whatever material he had been unable to locate in the KWOD public inspection file and the material, with the exception of the original construction permit application, was provided. The construction permit application was not required by our rules to be included in the file since it was more than seven years old (see Section 73.3526(e)(2)); nonetheless, Royce offered in its opposition to make it available to GECC if counsel continued to desire a copy. In view of these circumstances, we believe Royce acted in good faith and in substantial compliance with the rules, and that therefore no issue is warranted. Finally, once again, an ineptness issue is not warranted since GECC has failed in any way to meet the *Hammonton Aviation, supra*, test for such an issue.

52. *Miscellaneous.* GECC's final exception relates to the Commission's failure to specify an issue against Royce to determine whether it has reasonable assurance of the availability of a transmitter site. GECC contends that a conclusive presumption was created in 71 FCC 2d 460, *supra*, that the current KROQ site would be made available to Royce and that such irrebuttable presumptions are unlawful. GECC urges the Board to reverse the designation Order and specify a site availability issue against Royce. We shall decline GECC's invitation. In the absence of new facts or circumstances, the Board is precluded from examining allegations of error where there has been a thorough consideration of the particular question in the Designation Order. *See Atlantic Broadcasting Co.*, 5 FCC 2d 717, 8 RR 2d 991 (1966). Here, the Commission gave a reasoned analysis on this matter in 71 FCC 2d 460, at 466–468. Furthermore, the Commission subsequently noted in *Belo Broadcasting Corp.*, 88 FCC 2d 922, 926 n. 19, that although the term "conclusive presumption" was used in 71 FCC 2d 460, "the intent of *Cameron* was to hold in abeyance all considerations relating to a challenger's transmitter site until a final determination can be made as to which applicant would best serve the public interest." Thus, there is no basis for an issue in this regard either.

*Conclusions*

53. In retrospect, of course, the collective licenseeship of KROQ appears organically unqualified almost from its very inception, and the individual principals who constitute the GECC licensee have subsequently proved beyond dubitation that they are utterly unable to successfully manage or to satisfactorily operate a broadcast station in accor-

dance with the rules and regulations which accompany a Commission license. The licensed principals did not hold paramount the public interest trust vested in them by the Commission. Rather, the GECC principals swiftly fell to internecine divisions over their respective liabilities which they incurred as a partial result of a designed failure to exercise the slightest restraining control over the profligate activities of the station's appointed staff. Their detached attitude toward their rudimentary responsibility to ensure compliance with licensed duties and their neglect to assert themselves, early on, to correct the station's erratic course led first to financial disaster, then to disintegration, and finally to the desperate abandonment of their elementary public interest obligations under the KROQ license. In response to their myriad derelictions, the GECC principals contend—in essence—that they were simply hapless victims of extrinsic circumstances "largely beyond their control."[39] However, the record herein acutely exposes that the fatal fault which laid waste to KROQ and vanquished its investors lay not in their stars, but in themselves. As Commission licensees, the principals of GECC necessarily undertook a binding, non-delegable duty to manage their internal and external affairs in such a way as to assure the responsible performance of the station in accordance with the requirements enunciated by the Commission for technical and administrative compliance with its strictures. In these bedrock pursuits, they failed conspicuously. Along the way, they blithely ignored many of the Commission's rules and regulations. And by declining to subordinate their private disagreements, they simultaneously deprived the Burbank community of a functioning local station for nearly 2 years while they flailed amongst themselves for the possible protection of their individual pecuniary interest. In the end, the licensed principals effectively shifted any of their real interests in the license, and its appending obligations, to Kenneth Roberts and refused to cooperatively support the station with the resources necessary to try to resuscitate KROQ's tattered operations. In defense of its woeful record, GECC lamely submits that most, if not all, of its numerous failures stemmed completely from the alleged legal malpractice which established the company as a partnership rather than a corporation in the first place, thereby leaving the GECC principals vulnerable to personal liabilities beyond those limited amounts they had privately agreed amongst themselves to venture in the KROQ enterprise. This extraneous factor, however, is not at all exculpating in our view. Many of the approximately 10,000 other Commission broadcast licensees are partnerships, and many others are merely sole proprietorships not insulated in any way by the nuances of corporate law from sundry liabilities which may arise from the diverse business activities of an ordinary broadcast station. Neverthe-

[39] GECC Exceptions and Brief, at 32.

less, the Commission expects *all* licensees—regardless of their internal organizational structure—to conscienciously execute their duties in a manner which comports with relevant statutory and regulatory requirements. Here, instead of coalescing to meet their primary public interest obligations, the principals of GECC opted to tacitly withdraw from their station. Forgotten or foresaken in the process were the public interest pledges tendered to the Commission as consideration for the agency's grant of the license for KROQ. Finally, in a rampant effort to distance themselves from the escalating burdens of their station, they fixed upon the purchase and indemnification offers of Kenneth Roberts as the *deus ex machina* which, they hoped, would insulate them from the foreseeable consequences of their own mutual malfeasance.

54. For his part, Kenneth Roberts incrementally extended more and more credit to GECC in an expanding effort to salvage both his initial and later monetary investments in KROQ. Collaterally, he acquired increasing amounts of the equity of GECC until he eventually became the station's largest principal, its only creditor, and its *de facto* licensee. In the wake of his large personal investment in KROQ, Roberts here urges that he now be analogized to the "innocent creditors" left without safe harbor in those situations in which the licensee has gone legally bankrupt. On that predicate, Roberts seeks renewal of the KROQ license as a discrete party in interest so that the station may be sold for his personal benefit immediately following a limited Commission renewal for that exclusive purpose. However, Kenneth Roberts is, in our view, hardly an "innocent creditor" of the genre protected within the Commission's *Second Thursday* doctrine.[40] Unlike the conventional creditor of a bankrupt licensee, Roberts entered the GECC picture not as an outsider or one not privy to the station's entrenched economic and operational problems. Rather, Roberts, who was intimately familiar with those problems, continued to lend GECC money in spite of and, indeed, because of the fact that KROQ was on the brink of financial and organizational capsizement. In return for his successive investments, Roberts consciously accumulated a 49% *de jure* ownership interest in KTOQ and he has acquired additional options which would make him its solitary owner. Roberts, therefore, is not simply a mere creditor within the contemplated penumbra of *Second Thursday* but is, and has since 1973 been by far, the largest individual equity partner in the licensee. Were we to here hold that Roberts is an "innocent creditor" of KROQ, then it would ineluctably follow that all other licensees who have personally capitalized their broadcast stations are, at once, their own protected "innocent creditors" as well. This cannot be, and the Commission's limited policy in comity with the national bankruptcy laws which allows federal receivers to assign

[40] *Second Thursday Corp.*, 25 FCC 2d 112 (1970).

bankrupt stations is clearly inapplicable when the only "creditors" to be benefitted are, in fact, the licensee principals and when the so-called "credit" represents an equity interest in the station.[41]

55. Insofar as the requests of GECC and Roberts for renewal of the license of KROQ for the sole purpose of allowing the immediate sale of the station for the exclusive benefit of the principals, we have recently noted at length that Commission policy is firmly against permitting just the sort of post-hearing license alienation requested here. *West Jersey Broadcasting Company*, 90 FCC 2d 363 (Rev. Bd. 1982), citing *Stereo Broadcasters, Inc.* v. *FCC*, 652 F.2d 1026 (D.C. Cir. 1981). As the Commission has held many times, once a licensee is found disqualified for renewal, it has no license to convey. *Id.* That is the situation of GECC and its request (and Roberts') for renewal on that basis is rejected in accordance with long-standing Commission policy.[42]

56. Even were the Commission's administrative policy against post-disqualification renewal for purposes of assignment not so firmly lodged in precedent, permitting GECC's instant request for a post-hearing sale would essentially destroy the statutory entitlement of its competing applicant, Royce. Unlike *Stereo Broadcasters* or *West Jersey, supra*, there must be considered here the settled legal right of Royce to be compared on equal footing with GECC, *Citizens Communications Center* v. *FCC, supra*, and to be awarded the license if adjudged comparatively superior. *Central Florida Enterprises* v. *FCC, supra*. Royce has patiently prosecuted its application in good faith under the statutory mechanism established by Congress in Section 309(e) of the Communications Act; and, in accordance with the interpretative tenets derived therefrom, it is legally entitled to succeed to the KROQ license. For that immutable reason as well, GECC cannot be permitted to simply sell out under its disqualification (or, *arguendo*, its comparative inferiority).

57. In the final analysis, therefore, we affirm both the disqualification of GECC and the grant to Royce. Moreover, and as discussed previously, the end result would have been the same even without GECC's total disqualification. As both the Commission and the courts have declared, the grant of a broadcast license vests no inchoate legal right to a license renewal; a broadcast license is merely a carefully limited privilege which may be periodically renewed, but only upon an affirmative public interest finding. *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841 (D.C. Cir. 1970). *cert. denied*, 403 U.S. 923 (1971). License renewal is not automatic and must be earned. *Simon Geller, supra*. It may be terminated for "breach of duty," *Office of Communications of the United Church of*

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[41] Indeed, under *Second Thursday*, one of the matters negatively considered is whether the principals themselves will benefit from the sale. *See* 25 FCC 2d at 114.

[42] *See e.g. Jefferson Radio Co.* v. *FCC*, 340 F.2d 781 (D.C. Cir. 1964).

*Christ* v. *FCC*, 359 F.2d 994, 1003 (D.C. Cir. 1966), or lost to a competitor because of the incumbent's "substandard performance." *Central Florida Enterprises* v. *FCC*, 598 F.2d 37, 50 (D.C. Cir. 1978), cert. dismissed, 441 U.S. 957 (1979). By virtually any definition conceivable, the record of GECC was certainly "substandard" and entitles it to no reasonable "renewal expectancy." While a failure to renew the original license of KROQ occasions an unfortunate loss of investment capital to the principals of GECC, the potential risk of that investment loss is, nonetheless, explicit in the basic licensing scheme of the Communications Act (*see* 47 U.S.C. § 307(d)) and is well known to those who pursue and hold a broadcast license from the Commission. The principals of GECC were presumptively aware of the incipient risk of non-renewal. The loss of their license through their own blatant neglect and their conspicuous ineptitude, therefore, is the inexorable result of the unique dynamics of communications law.

58. ACCORDINGLY, IT IS ORDERED, That the motion to dismiss for failure to prosecute, filed May 20, 1982, by Royce International Broadcasting Company IS DISMISSED; and

59. IT IS FURTHER ORDERED, That the motion for additional time filed June 22, 1982, by San Marco Broadcasting Company IS DENIED: and

60. IT IS FURTHER ORDERED, That the Broadcast Bureau's motion to dismiss petition for reconsideration, filed June 18, 1982, IS DISMISSED; and

61. IT IS FURTHER ORDERED, That the application of Royce Broadcasting Company for a construction permit for a new AM station (BP–20,111) IS GRANTED; the license renewal application (File No. BR–2724) of George E. Cameron Jr. Communications for Station KROQ, Burbank, California IS DENIED; and the application of Baker-Smith Communications, Inc. for a construction permit for a new AM station (File No. BP–20,191) IS DISMISSED; and George E. Cameron Jr. Communications IS AUTHORIZED to continue operation of Station KROQ (AM) until 12:01 A.M., November 3, 1982, to enable the licensee to conclude the station's affairs, unless an application for review or petition for reconsideration is filed within 30 days, in which case the effective date will be suspended pending further order of the Board or Commission.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

Domestic Public Land Mobile Radio Service, Need For Notice of Commission Action
Reconsideration, Petition For, Time For

Commission affirmed staff's action dismissing Petition for Reconsideration as untimely where filed on thirty-first day after release of *Memorandum Opinion and Order* granting DPLMRS CP. Application for DPLMRS transmitter to fill in obstructed area within reliable service contour is not application to serve new service area. —*Mobile Telephone, Inc.*

FCC 82–449

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

| | |
|---|---|
| In re Application of<br><br>MOBILE TELEPHONE, INC.<br><br>For authority to construct additional transmitting facilities for two-way Station KOE252 to operate on the presently assigned frquencies 152.09 MHz and 152.12 MHz at Pine Meadow Peak (near Coalville) Utah, in the Domestic Public Land Mobile Radio Service | File No.<br>21791–CD–<br>P–(4)–79 |

MEMORANDUM OPINION AND ORDER

Adopted: October 13, 1982; Released: October 18, 1982

BY THE COMMISSION:

1. Presently before the Commission is an Application for Review, filed by David R. Williams d/b/a/ Industrial Communications (Industrial), of the action of the Chief, Common Carrier Bureau, dismissing Industrial's Petition for Reconsideration in the captioned proceeding by memorandum Opinion and Order in *Mobile Telephone, Inc.*, Mimeo 002141, released July 13, 1981. The Application for Review was opposed by Mobile Telephone, Inc. (MT). Industrial filed a reply.

*Background*

2. Pursuant to delegated authority, the Bureau granted the captioned application in part by a Memorandum Opinion and Order, Mimeo 07117,

released February 23, 1981 (First MO&O).[1] Notice of that partial grant appeared in a Public Notice of Actions Taken dated March 4, 1981. Industrial filed a Petition for Reconsideration of the partial grant on March 26, 1981, the thirty-first day after release of the First MO&O.[2] That petition was opposed by MT as having been untimely filed under Section 405 of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 405, and Section 1.106 (f) of the Rules, 47 C.F.R. § 1.106(f),[3] and also as being substantively without merit.

3. In response, Industrial claimed that under Section 1.106(f), the full text of the Bureau's action was the construction permit itself and not the Bureau's First MO&O; that since construction permits are not released to the public, it is the public notice document announcing the grant of the permit that constitutes "public notice" for purposes of Rules Section 1.106(f) and Section 405 of the Act; and that its petition was therefore timely because it was filed within 30 days of the March 4, 1981, public notice document. In the Bureau's July 13, 1981, Memorandum Opinion and Order (Second MO&O) now before us for review, the Bureau held that the statutory thirty-day limit for filing a petition for reconsideration of the partial grant began to run with the release of the Bureau's First MO&O and could not be extended. The Bureau dismissed Industrial's Petition for Reconsideration as untimely and did not address the petition's merits.

*Discussion*

4. Industrial's Application for Review fails to advance any additional significant and persuasive arguments regarding the timeliness of its Petition for Reconsideration. The thirty-day period for filing a petition to reconsideration in this case began to run on February 23, 1981, with the release of the Bureau's First MO&O. The First MO&O was clearly the full text of the "action document" released in this matter. The release date of an "action document" under 47 C.F.R. § 1.4 begins the computation of the thirty-day period for filing a petition for reconsideration under Rules

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[1] At para. 3 of the First MO&O, the Bureau concluded that the instant application was for a "fill-in" transmitter since more than fifty percent of the proposed reliable service area fell within the station's existing reliable service area. *See* the Bureau's Public Notice dated July 27, 1981, Mimeo 002411. A less stringent showing of public need is required in support of an application for a "fill-in" transmitter than for an application for a new location. The First MO&O also designated for hearing a related application of MT, Docket No. 81–67, File No. 20186–CD–P–(6)–79, on the issue of public need and denied in part petitions to deny both applications filed by Industrial alleging, *inter alia*, that MT had failed to demonstrate sufficient public need. A request for a waiver of the height-power rule, 47 C.F.R. § 22.505, was also denied.

[2] Industrial's petition for Reconsideration argued that the Bureau was incorrect in finding that the instant application was a proposal for a "fill-in" transmitter.

[3] In our Memorandum Opinion and Order in General Docket No. 80–488, 85 FCC 2d 618, 46 FR 18851 (March 25, 1981), we amended Rules Sections 1.106 and 1.4(b) and other conforming rules sections, effective April 27, 1981. However, Industrial's petition was filed before the new rules took effect and must be considered under the old rules.

Section 1.106(f). *See Microwave Communications, Inc. (MCI) v. FCC*, 515 F. 2d 385, 395–97 (D.C. Cir. 1974), *cited in Gardner v. FCC*, 530 F. 2d 1086, 1091, n. 21 (D.C. Cir. 1976). In cases such as this, an "action document" is a statement describing the reasons for denying a petition to deny and granting an application for a construction permit. *See* 47 U.S.C. § 309(d)(2) and *MCI v. FCC*, *supra*, at 391–92. A construction permit does not contain such information and therefore may not be considered an "action document."[4] Thus, Industrial's Petition for Reconsideration was filed on the thirty-first day after public notice of the action taken was given and was untimely under the Act and our Rules.

5. Industrial also argues that the thirty-day filing limit of Section 405 of the Act does not preclude consideration by the Commission and that the Bureau has repeatedly applied Section 405 inconsistently by requiring stringent adherence to the thirty-day filing limit while failing to comply with the statute's ninety-day limit for acting on petitions for reconsideration. These arguments are without merit.[5] Relying on Section 405 of the Act, the Court of Appeals has held that under usual circumstances, the time for filing a petition for reconsideration expires 30 days after the Commission's decision becomes available to the public. *Gardner v. FCC*, *supra*, at 1091.[6] Therefore, where a petition is untimely filed due to causes within the petitioner's control, the Bureau's failure to act within 90 days cannot legitimatize the petition's untimeliness under the Act; otherwise a grantee could not be certain whether its grant were subject to further challenge. *See Valley Telecasting Co. v. FCC*, 336 F. 2d 914 (D.C. Dir. 1964). Conversely, while the Commission endeavors to act on all timely and proper requests for reconsideration at all levels of authority as quickly as practicable, we believe we have the authority and the obligation to act even where the statutory ninety-day limit has passed.[7] After reviewing all of the arguments made here and below, we affirm the

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[4] As the Bureau stated at para. 3 of its Second MO&O, the issuance of a construction permit was a ministerial act carried out in accordance with the action taken in the First MO&O. Announcement of the grant in the Bureau's Public Notice document in this case was a courtesy or convenience and not legal public notice under Section 405 of the Act.

[5] Industrial incorrectly cites our decision in A, F&L Telephone, FCC 81–112, released March 12, 1981( petition for writ of mandamus denied, D.C. Cir. Case No. 80–2509, March 30, 1981, as evidence that we do not consider Section 405 a limitation on our jurisdiction. That opinion did not address the issue of compliance with Section 405 and contained no direct statement or implication that Section 405 does not limit the Commission's jurisdiction. indeed, our decisions have consistently dismissed untimely filed petitions for reconsideration under Section 405. *See e.g.*, American Broadcasting Companies, Inc., 86 FCC 2d 1 (1981); Scripps-Howard Broadcasting Co., 69 FCC 2d 1477 (1978); Metromedia, Inc., 56 FCC 2d 909 (1975), *recon. denied*, 59 FCC 2d 1189 (1976).

[6] The court further held that the Commission's failure to give a party personal notice of an action, or our failure to give such notice within a reasonable amount of time, warranted the waiver or extension of the statutory thirty-day filing requirement in the interests of procedural fairness. *Id.* Industrial does not argue that this has occurred here.

[7] The court has recognized that the ninety-day limit is not absolute. Citizens Committee v. FCC, 436 F. 2d 263, 268, n. 5 (D.C. Cir. 1970).

Bureau's action dismissing Industrial's Petition for Reconsideration as untimely.[8]

6. Although Industrial's petition was untimely, we have considered the merits of the petition in order to clarify the policy in question. Industrial argued that when an existing mobile radio licensee files an application to serve an area within its authorized reliable service contour, as computed by the Carey Report (Carey),[9] which does not receive adequate service due to irregular, *i.e.*, mountainous, terrain, the application should be considered as a request to serve a new area and must be supported by a full demonstration of public need. Under the Bureau's prevailing policy, in order for an application to be considered as requesting a "fill-in" transmitter, at least fifty percent of the proposed Carey predicted reliable service area must be encompassed within the existing station's Carey-predicted reliable service area, and coverage may not be extended to a new market. *See* n. 1, *supra*. If an application meets the "fill-in" criteria, the Bureau does not require the applicant to supply a rigorous and detailed showing of public need.

7. As noted in n. 1, *supra*, the Bureau found that MT's instant application was for a "fill-in" transmitter under the above policy. We endorse the Bureau's approach. In our opinion, under the Bureau's fifty percent overlap policy, an obstructed area within the Carey-predicted reliable service area is not a new service area, whether or not service has been or is capable of being provided there. A "fill-in" transmitter granted under these circumstances is consistent with our established policy of allowing a licensee to improve service within its authorized reliable service area contour without significantly expanding its service area. *See RAM Broadcasting of Texas, Inc.*, 52 FCC 2d 697, 699 (1975), and cases cited therein. Furthermore, no showings of irregular terrain (or sigal-strength ratio) are required for "fill-in" applications. Therefore, we find that the substantive argument advanced in Industrial's Petition for Reconsideration is without merit and that the Bureau correctly considered MT's application to be a "fill-in" location.

8. Accordingly, IT IS ORDERED, That the Application for Review filed by David R. Williams d/b/a Industrial Communications in File No. 21791–CD–P–(4)–79 IS DENIED and that the decision of the Common Carrier Bureau in *Mobile Telephone, Inc.*, Mimeo 002144, released July 13, 1981, IS AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

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[8] We note that under Rules Sections 1.106 and 1.4(b) as amended, *supra*, n. 3, Industrial's petition would have been timely.

[9] Roger B. Carey, Technical Factors Affecting the Assignment of Facilities in the Domestic Public Land Mobile Radio Service, FCC Report No. R–6406 (June 24, 1964).

Lottery
Ownership Diversification of
Preference
Rule Making, Notice of Proposed

Commission solicited comments on proposals to develop an application process using random selection or lottery to choose first-time licensees who seek to use the electro-magnetic spectrum. Rule changes would provide preferential treatment to groups and individuals who own few or no mass communictions.
—*Random Selection/Lottery Systems*
Gen. Docket No. 81–768

FCC 82–420

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

| | |
|---|---|
| In the Matter of<br><br>Amendment of the Commission's Rules to Allow the Selection from Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings* | Gen. Docket No. 81–768 |

Adopted: September 23, 1982; Released: October 7, 1982

BY THE COMMISSION: CHAIRMAN FOWLER CONCURRING IN THE RESULT.

* The caption of this docket has been changed. Originally, the caption referred to Part 1 of the Commission's Rules. Because this proposal seeks to change several parts of the Rules, we have changed the caption accordingly.

## *Second Notice of Proposed Rule Making*

1. We have before us new legislation[1] that amends Section 309(i) of the Communications Act of 1934, as amended. The Conference Report accom-

[1] The Communications Amendments Act of 1982, P.L. 97–259, Section 115, enacted September 13, 1982, amended Section 309(i) of the Communications Act of 1934, as amended, 47 U.S.C. Section 309(i) (the "Act"). Pertinent portions of the statute are reproduced in Appendix C. A copy of the relevant section of the Conference Report, H. Rep. No. 97–765 at 37–49, will be placed in the docket and will be available for public inspection. Commenters are requested to review this guidance to the Commission closely.

panying the legislation indicates that the Congress intends the Commission to enact implementing regulations within 180 days of passage. Thus, in light of the new legislation, we have determined to reopen this docket and seek additional comments.[2]

*Introduction*

2. This Notice proposes implementation of our recently amended authority to use a system of random selection or lottery to select a licensee when there is more than one application for an initial license for any use of the electromagnetic spectrum.[3] This legislative action followed the Commission's first *Report and Order* in General Docket No. 81–768[4] which concerned the previous version of this authority. We there declined to implement our authority to establish a random selection system because we were unable to devise a lottery which could achieve the stated legislative purposes within the statutory constraints. Many of the issues raised in the Docket to date have been resolved by the new legislation.

3. This Notice proposes certain services and applications which would be subject to a lottery and proposes procedures for the treatment of applications prior to the conduct of the lottery, the lottery itself and for the use of hearings in conjunction with the lottery. Additionally, specific rules are proposed for the awarding of preferences in the lottery. We solicit comment from the public on all of the proposals described in greater detail below.

*Services and Applications Subject to Random Selection*

4. The relevant legislative history of the lottery statute indicates that the Congress intended the Commission to use random selection techniques where the public interest would best be served. Factors that the Committee determined the Commission should consider include: whether there are a large number of available licenses; whether there are a number of mutually exclusive applicants for each license; whether there is a significant back-log of applications and a lottery would speed service to the public; and whether diversity of information sources would be enhanced. *See* H. Rep. 97–765 at 37–38 (hereinafter cited as "Conference Report").

5. Based upon these and other relevant criteria, the Commission believes that, at the present time, there are three types of services that are

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[2] A petition for reconsideration of the first Report and Order was filed on March 24, 1982 by Victor M. Lopez. The petition, *inter alia*, requested the Commission to promulgate regulations under the initial lottery statute. Passage of the new lottery legislation moots Mr. Lopez' petition.

[3] Proposed "major changes" would be treated as initial applications for lottery purposes. *See* 47 C.F.R. §§ 73.3571(a)(1), 73.3572(a)(1), 73.3573(a)(1). Hereinafter, all references to licenses should be construed to include construction permits, except where otherwise noted.

[4] *Report and Order*, Gen. Docket No. 81–768, 89 FCC 2d 257–296 (1982), concluding the proceeding commenced at 88 FCC 2d 476–508 (1981).

amenable to the use of random selection techniques. The three service areas are the low power television and television translator service,[5] certain Private Radio Services and the public mobile common carrier radio service (excluding cellular).

6. The Commission also proposes to use lotteries in other services on an *ad hoc* basis in those instances where the qualifications of competing applicants are so close that no material difference between the parties' ability to serve the public interest can be distinguished.[6] We believe that there is adequate authority to use lotteries in these instances. While the Conference Report cites several relevant factors to consider in determining whether a lottery would serve the public interest, Conference Report at 37, it notes that random selection authority may also be used in "those services or *instances* in which it determines that [it] would be appropriate." *Id.* at 38 (emphasis added). The public interest, we believe, would be served by using a lottery in these cases since both public and private resources would be spared from further pursuing the comparative process and the new service would go on the air more quickly. In addition and, most importantly, if the subject service involved a "medium of mass communications," diversity could be enhanced through the operation of the appropriate preferences.[7] We seek comment on the proposal to establish general authority to use lotteries and, where applicable, preferences in such instances.

7. We therefore propose to use lottery procedures in the services identified in this *Notice* and also on a case-by-case basis for such other applications as the Commission determines meet the criteria discussed in paragraph 4 above. Within that context, any proceeding in which the first application was tendered for filing after the effective date of the initial version of Section 309(i) (*i.e.*, on or after August 14, 1981) may be subject to a lottery. In addition, all pending applications in the low power television service will be subject to a lottery, including those filed under the interim rules prior to August 14, 1981.[8]

*Low Power Television*

8. Congress has stated its intention that a system of random selection should be applied to select low power television licensees. *See* Conference Report at 38. We seek comments on the implementation of new low power

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[5] Hereinafter referred to as "low power television" or "LPTV".

[6] This will enable the Commission expeditiously to resolve the so-called "tied cases".

[7] *See* § 1.1621(a) of the proposed Rules.

[8] Low power applicants have been on notice at least since adoption of our *Low Power Report and Order* that we intended to use a lottery system for low power television should one be authorized. *See Low Power Report and Order*, 47 Fed. Reg. 21468 (May 18, 1982). There, we stated, "[W]hen and if a system of random selection is instituted for choosing among competing broadcast applications, it, of course, will be applied to low power," *Id.* at 21472.

rules which will provide for a lottery procedure that is consistent with Congressional intent and the public interest. As noted above, the Commission has previously expressed its desire to use a lottery system for low power television, should one be authorized. Now that Congress has given us authority to implement a lottery and has expressed its intention that we do so, changes must be made in the procedures set forth in the *Low Power Report and Order.* Our proposed revision of Sections 73.3591 and 73.3593 to reflect these differences is included in the attached Appendix B.

*Common Carrier Public Mobile Services.*

9. We propose to implement a random selection procedure for the public land mobile service (excluding cellular)[9] the rural radio service and the offshore radio service. In general, it is our view that a lottery would be useful in the public mobile service because of new frequency allocations which are expected to result in an extremely large number of mutually exclusive applications. New allocations for 35 MHz paging (CC Docket 80–189)[10] have already occurred and 900 MHz paging (Gen. Docket 80–183)[11] can be expected to result in an extremely large number of applications, with a substantial number involving mutually exclusive situations.[12] Because of the large number of applications, our skepticism that existing comparative criteria will provide a meaningful mechanism for selecting applicants, and the overwhelming administrative burden that would result, we propose to implement a lottery procedure for applications filed in the public land mobile service. We seek comment on this proposal.

10. We have carefully reexamined our decision not to select cellular licensees through a lottery procedure, in light of the passage of lottery legislation, and we again conclude that a lottery would be inappropriate in the cellular service. First, random selection appears to be inappropriate for determining which competing cellular applicant, from a group whose proposals may differ in significant ways, shall be granted a license for the establishment of one of the only two systems in a market. A cellular

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[9] The public land mobile service includes one-way land mobile service, two-way land mobile service, and the two-way air-ground mobile service. *See* 47 C.F.R. Part 22.

[10] 35 MHz applicants have been on notice since adoption of our 35 MHz *First Report and Order* that Congress might adopt lottery legislation and that the Commission might use the procedures for dealing with mutually exclusive applications that are in effect at the time the need to decide among applicants arises. 47 Fed. Reg. 34561 (Aug. 10, 1982).

[11] 900 MHz applicants have been on notice since adoption of our 900 MHz *First Report and Order* that, if mutually exclusive situations should arise, they would be resolved consistently with the prevailing procedures for deciding among such mutually exclusive applications. 47 Fed. Reg. 24557 (June 7, 1982).

[12] When, in 1968, for example, the Commission allocated additional paging frequencies in its *Guard-band Paging Allocations*, the Mobile Services Division was faced with hundreds of mutually exclusive applications. As a result, some application packages took almost 8 years to resolve.

system requires a high capital investment and great technical expertise to realize the maximum benefits of cellular technology. Because of the limited number of licenses that can be granted in this service, it is especially important that the selection process be designed to award a license to an applicant proposing a high-quality cellular system.

11. In addition, we have set forth only limited standards (*see, e.g.*, Section 22.913 of the Commission's Rules) for determining whether applications are "acceptable for filing", leaving system coverage and quality to be determined by the comparative process. If we were to resort to a lottery, it would be necessary to establish threshold standards for applications, in order to avoid a rush of superficially "acceptable" lottery entries that would be incapable of fully implementing the promise of cellular radio. Yet applications for the top markets will have been filed by January 7, 1983, and it is unlikely that we would be able to adopt substantive standards before that time.

12. In the cellular rulemaking we recognized the need to develop procedures that would allow the public to receive cellular service with a minimum of delay. For that reason, we adopted a "set-aside" policy[13] and established expedited hearing procedures. The latter procedures call for non-wireline applicants to submit their direct hearing case with their applications (in the thirty largest markets) and otherwise streamline the hearing process to insure a prompt resolution of application conflicts. We remain of the view that these procedures are the best way to proceed with the processing of mutually exclusive applications in this new and technologically complex service[14].

13. We do propose to include both the rural radio service and the offshore radio service in the lottery procedure. The rural radio service is a

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[13] The need to expedite the provision of cellular service was but one of the reasons underlying the set-aside. In our Reconsideration Order in *Cellular Communications Systems*, 89 FCC 2d 58 (1982), we emphasized that the separate allocation of frequencies for wireline and non-wireline carriers was responsive to the concerns of the court of appeals in *NARUC v. FCC*, 525 F.2d 630 (D.C. Cir.), *cert. denied*, 425 U.S. 991 (1976). By providing that there be two cellular systems per market—one wireline and one non-wireline carrier—we have insured that no single company will be able to operate a majority of cellular systems and that there will be continued vigorous competition between the two groups of carriers in all markets. 89 FCC 2d at 73.

We recognized that there were substantial public interest benefits accruing from the presence of local telephone companies in the provision of cellular service—benefits arising from the substantial expertise of all telephone companies in "traffic engineering and the establishment of high capacity local switching networks" as well as from AT&T's leadership position in the development and implementation of cellular technology. 89 FCC 2d at 71.

But the set-aside policy is perhaps most important because it will expedite the implementation of cellular service by minimizing the delay due to comparative hearings. 89 FCC 2d at 70. Lotteries are, as we discuss above, not an appropriate way to minimize this delay in the cellular service.

[14] We note that many of the applications for the top thirty markets, filed under these procedures, will be ready to be granted or designated for hearing in the near future. The time that could be saved by using lotteries to select licensees in these markets could be as little as a few months.

fixed two-way service for rural areas where land-line service is impracticable. The offshore radio service is a fixed two-way service to serve offshore drilling platforms near Louisiana. We believe that in case mutually exclusive situations arise, in these two services, this approach will expedite service to the public and eliminate the administrative burden of lengthy comparative proceedings.

*Private Radio Services*

14. In most of the Private Radio Services, licensees do not receive exclusive use of a frequency in a given geographic area, but must share it with other licensees. However, exclusive assignments are made for Aeronautical Advisory Stations in the Aviation Services (UNICOM Stations), and for Stations on Land in the Maritime Services (Public Coast Stations). Occasionally, comparative hearings have been necessary to select from among competing applicants. In applying the criteria specified in the Conference Report, it appears that selection by lottery would be appropriate in these two services. Private Radio licensees do not provide mass media services nor do they exercise editorial control through programming or the dissemination of information to the public at large. The Conference Committee's concerns about diversification of media information and ownership, therefore, are not applicable in the Private Radio Services and significant preferences are not at issue. A lottery system should facilitate the selection of qualified licensees in these two services. It appears that a lottery would bring service to the public in the quickest way possible, at the least cost to applicants, with no significant reduction in the qualifications of licensees. *See* Conference Report at 37–38.

15. While comparative hearings have not been necessary to date in other Private Radio Services, exclusive assignments are also made to certain Private Land Mobile stations operating at 800 MHz,[15] and to Microwave stations in the Private Operational-Fixed Service. We have structured our release of 800 MHz frequencies in a fashion which groups generic categories of eligibles and which makes it likely that within each category of eligibility the qualifications of competing applicants to serve the public interest are without substantial material differences. Similarly, in the Private Microwave Service the differences in competing applicants would appear to be minimal in most cases. As the demand for private communications systems increases, we may receive more applications in these services than we can accommodate in the available spectrum. Significant backlogs could develop and a lottery might enable us to

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[15] In our recent *Second Report and Order* in the 800 MHz proceedings, PR Docket 79–191, 47 Fed. Reg. 41002 (Sept. 16, 1982), we made it clear that "should Congress adopt legislation giving us authority to assign channels based on a lottery, we [would] consider such a method to choose among competing applications."

speed up the process of getting service to the public. We solicit comments on these related issues, as, for example, whether selection by lottery should apply to applications in all the different classes of Private Land Mobile Services.

*Procedures*

*Broadcast Procedures*

16. Once an application for a new license which is subject to our lottery procedures is tendered and found acceptable for filing,[16] it will be listed in a public notice inviting competing applications until the specified cut-off date approximately thirty to sixty days later (the "A" list). Applications filed after the "A" cut-off date will not be eligible for consideration or grant as part of the already-initiated proceeding. Competing applications found acceptable for filing will be listed in a public notice ("B" cut-off list) announcing that the lottery will be conducted. This list will indicate the preferences for which the applicants certify they are eligible and their selection probabilities. Clerical or mathematical errors in this information should be brought to the Commission's attention immediately. The lottery will then be conducted and the tentative selectee will be named in a public notice providing an opportunity for the filing of Petitions to Deny.

*Common Carrier Procedures*

17. In the Common Carrier Public Mobile Services, the current public notice and pleading procedures found in Part 22 of our Rules will be used to govern the filing and processing of applications. Applications which are found to be mutually exclusive will, under our proposed lottery procedures, be included in a random selection proceeding under the Rules as proposed herein. The tentative selectee's application will then be reviewed along with any pleadings which have been timely filed. In the case of applications not selected in the random selection proceedings, petitions to deny and any related pleadings will not be considered.

18. If, after reviewing the randomly selected application and any related pleadings, the staff cannot conclude that a grant would serve the public interest, that application will be designated for an expedited hearing under the procedures proposed in this Notice. If, at the end of the hearing, the application is denied, a second random selection will be held from among the remaining applications in the original pool of mutually exclusive applicants. The newly selected application will be reviewed in the same fashion as described above.

*Private Radio Services Procedures*

19. As 800 MHz frequencies become available for assignment, the Commission periodically will issue a Public Notice stating that applica-

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[16] *See* Conference Report at 39.

tions for those frequencies will be accepted for a time period specified in the Notice. If more applications are received during that period than may be accommodated on available frequencies, licensees will be selected by lottery shortly after the cut-off date specified in the Notice. Under the Communications Act and our rules, Petitions to Deny may not be filed against applications for Private Land Mobile licenses. 47 U.S.C. § 309; 47 C.F.R. § 1.962. Formal filings involving oppositions and replies will not be entertained. Furthermore, these applications do not involve "media of mass communications," as described in the Conference Report, and we therefore need not grant preferences. As stated in the Report, the lottery procedures for these non-media applications will be "extremely simple, with each applicant for a given license receiving a selection probability of 1/x, where x equals the total number of applicants." Conference Report at 46. Our purpose in proposing a lottery in these services is to expedite service to the public. We expect to process the applications of the tentative selectees in accordance with current procedures and we will designate applications for expedited hearings, where necessary, as described herein. Further details concerning each particular private land mobile lottery will be specified in the Public Notice.

20. In our Private Radio Services where we are proposing to select licensees by lottery when mutually-exclusive applications are filed (i.e., UNICOM stations in the Aviation Services and Public Coast Stations in the Maritime Services), or when the number of applications exceeds the available supply of frequencies, as in the Private Operational-Fixed Microwave Service, Petitions to Deny will be entertained under our proposed Rules, in accordance with statutory requirements. 47 U.S.C. § 309. We also are concerned in these services, however, that our processing time for applications not be lengthened as a result of the lottery procedures. Because significant preferences are not at issue in these services and basic qualifications are more easily determined and fulfilled than in many other services, we are proposing to streamline the lottery in the Private Radio Services. We propose that Petitions to Deny, as well as competing applications, be filed before, not after, the lottery is conducted. This should enable us to eliminate the necessity of a second time-consuming Public Notice inviting Petitions to Deny. As a result, we should be able to expedite the processing of these applications, as we have done in the past. We are proposing to treat the Private Radio Services differently because we are concerned that the lottery procedures for these "non-media" services be "extremely simple."[17] *See* Conference Report at 46. After the lottery is conducted, the Petitions to Deny against

[17] In the future, however, if any applications involving mass distribution of video entertainment are processed by lottery, we would propose to grant appropriate significant preferences in accordance with statutory requirements.

the tentative selectee will be reviewed and qualifications will be determined by the staff consistent with current procedures. We propose to conduct expedited hearing proceedings, if necessary, in the same manner as all other services subject to selection by lottery.

*Lottery Procedures*

21. The lottery function would begin with the list of all the applicants which contains their final probabilities, including all preference factors, where appropriate. The applicants would then each be assigned a portion of the interval between .000 and .999, according to their selection probabilities. For example, if there were three applicants with probabilities .25, .25, and .50 respectively, the first applicant would have the interval .000 to .249, the second applicant would have .250 to .499, and the third would have .500 to .999. The next step would be to generate a random number in the range of .000 to .999. We expect to use a lottery device or machine for this task. The tentative selectee would be the applicant in whose interval the random number fell.

22. The Commission is concerned about the integrity of the random selection process. To ensure that this process operates in a fair and equitable manner, the system for generating random outcomes and any equipment used in this activity will be available for public review and inspection. Additionally, we expect that the public, including individual applicants, will be permitted to attend the sessions when random selections are made. In accordance with the spirit of the Government in the Sunshine Act, 5 U.S.C. § 552b, we are proposing that public notice of the drawings will be made at least seven days in advance. The Commission may from time to time as may be necessary to ensure a completely fair and objective lottery, modify, revise, or replace any procedures or equipment associated with operation of the lottery.

*General Post-Lottery Procedures*

*Petitions to Deny*

23. In the broadcast service, the public notice announcing the tentative selectee will provide an opportunity for the filing of petitions to deny only against the tentative selectee within a specified period in those services in which such petitions properly lie and in which they have not been filed prior to the lottery. If no petitions to deny have been filed against the tentative selectee, that application will be reviewed by the staff to determine that the applicant is fully qualified to be awarded the license and either a grant or a hearing designation order will be issued. The tentative selectee will have twenty days from the deadline for Petitions to Deny announced in the Public Notice to file an opposition and then the petitioner will have twenty days in which to file a reply. Following a review of

these pleadings and the application, either a grant or hearing designation order (paper, oral or both) will be issued. Procedures regarding petitions to deny in the common carrier and private radio services are specified in paragraphs 18–19 and 20–21, respectively.

*Hearings*

24. A Memorandum Opinion and Order on the petitions to deny will dispose of issues that do not raise substantial and material questions of fact and will also designate any remaining issues for hearing and include the pleading schedule to be followed by the parties.[18] Actions on petitions to deny which do not raise new or novel issues may be taken by delegated authority.

25. We anticipate that most petitions will be resolvable at the staff level without the necessity of a hearing and that most hearings will be paper hearings conducted before the Commission.[19] The Commission *en banc* will receive the evidence and issue the final decision regarding the tentative selectee's qualifications. The appropriate Bureau will serve as advisor to the Commission. As such, the Bureau will be responsible for reviewing and analyzing pleadings, and preparing a draft of the final decision. The Bureau will not appear as a party unless the Commission orders it to do so in a particular case.[20]

26. With regard to the paper hearing, the public notice will instruct the applicant to submit its direct case in writing on or before the date set in the notice. This will be approximately 30 days from the release date of the notice. The direct written case must set forth all those facts and characteristics related to the issues in the designation order. Documentary evidence upon which the applicant relies must be attached. Each exhibit must be numbered and must be accompanied by an affidavit from someone with personal knowledge of the facts therein attesting to the truth of the submission. The public notice will also specify those petitioners to

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[18] Applicants are reminded of the prohibition against *ex parte* presentations to decision-making Commission personnel in adjudicative proceedings prior to or after designation for hearing. 47 C.F.R. § 1.1203. Because of the various Bureaus' role as advisor to the Commission regarding these applications, the Bureau Chiefs and their pertinent staffs will be considered to be decision-making Commission personnel with regard to any hearing, paper or otherwise, conducted pursuant to the procedures prescribed herein. However, should any of the Bureau staff be designated as separated trial staff for the purpose of participating as a party in any such hearing, that separated trial staff shall be non-decision-making personnel. Such staff shall be separated from decision-making personnel.

[19] As we stated in our low power television and 800 MHz decision, we believe that we may be able to shorten the administrative process through the use of a modified paper proceeding directly administered by the Commission. *Low Power Television Broadcasting and Television Translators, Report and Order*, BC Docket No. 78–253, FCC 82–107, 47 Fed. Reg. 21468, 21484 (May 18, 1982). *See* Note 8, *supra*. *See also Cellular Communications Systems*, 86 FCC 2d 469, 499–501 (1981), *procedures modified in part on reconsideration*, 89 FCC 2d 56, 90–94 (1982).

[20] Of course, should the Bureau participate as a party, it will not advise the Commission regarding that case unless its party participation is through a separated trial staff.

deny that directly raised an issue designated in the public notice and inform them of the opportunity to submit a written rebuttal case within twenty (20) days after the direct case is due. As with the direct case, documentary evidence submitted with the rebuttal case must be placed in a numbered exhibit and accompanied by an appropriate affidavit from someone with personal knowledge of the facts therein. A request may be submitted for oral hearings and cross examinations or other mechanisms by parties in the proceeding at the time the rebuttal case is due and, in the case of applicants, within ten days after the rebuttal case is due. A party submitting such a request must state the subject matter of the desired cross-examination or other mechanism and the basis for it, such as the scope of examination, the evidence to be presented, the reason why the evidence is material to the outcome of the proceeding, the reason why an oral hearing with cross-examination is necessary to bring out this evidence, and the evidence in the record which would be contradicted by the cross-examination.

27. The Commission intends to dispose of as many lottery applications as possible pursuant to the paper procedures described above. When reviewing the rebuttal case before it, the Commission also will consider any requests for oral testimony. However, as we stated in our low power television decision[21] and 800 MHz decision[22] we will order oral testimony only in limited circumstances; *i.e.*, where it is shown that the party will be prejudiced by a paper proceeding without oral testimony; where a substantial and material question of fact which would affect the outcome cannot be resolved without oral testimony; or where oral testimony would otherwise be required by the public interest. If the Commission makes a decision on the basis of the written direct and rebuttal cases and any other authorized pleadings, the request for oral testimony will be deemed denied. No separate order will be issued disposing of the request for oral hearing.

28. If the Commission concludes that an oral proceeding is neceesary, it will issue an interlocutory order directing an Administrative Law Judge to hear a particular issue or issues. The order will specify the issue or issues and set a prehearing conference to establish a discover (where applicable) and trial schedule.[23] The Administrative Law Judge ("ALJ") shall conduct the proceeding and certify the entire record made before him to the Commission. Where an issue is raised *sua sponte* or where the Commission determines that Bureau participation is necessary, the Bureau will be represented by a separate trial staff.

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[21] *Low Power Television Broadcasting and Television Translators*, 47 Fed. Reg. at 21485.

[22] *See* note 17, *supra*.

[23] Only at this point may applicants avail themselves of the discovery procedures normally available in adjudication cases.

29. Following completion of the proceedings (paper, oral or both), the staff shall submit for Commission action the record from the paper proceeding and if any, the transcript from the oral procedure before the ALJ. The Commission, with the assistance of the appropriate Bureau staff will either grant the license to the tentative selectee or shall find the tentative selectee unqualified. In the latter case, a second lottery will be held from among the remaining applicants, based upon recomputed selected probabilties. We request interested parties to comment on the above proposals and solicit other proposals with respect to the low power hearing procedures.

*Other Matters*

*Certification*

30. All applicants, as part of their application for any service named above in which random selection may be used, shall include a certification that the applicant is the real party in interest and that no agreement, either explicit or implicit, has been made to transfer or assign the license at a later date to any other party. *See* Conference Report at 45–46. Applicants in services subject to a lottery shall append to their application a certification signed and dated by the applicant(s) as follows:[24]

I (We) hereby certify that no agreement, either explicit or implicit, has been entered into for the purposes of transferring or assigning to another party, any station construction permit or license or interest therein that is awarded as a result of a random selection or lottery.

_____

(Applicant)

*Restrictions on Transfer of Construction Permits or Licenses*

31. The Conference Report states that when utilizing a lottery to award licenses in a medium of mass communications, the Commission should apply its present "anti-trafficking" rules, 47 C.F.R. § 73.3597, or similar protections. It is the Conferees' belief that such action is necessary in order that the preference scheme not be "undermined by the rapid reassignment or transfer of stations, construction permits or licenses granted by a lottery," Conference Report at 45. In the *Low Power* proceeding, the Commission adopted a one-year holding period on new licenses awarded by virtue of a comparative preference. 47 Fed. Reg.

[24] The Commission intends, as a matter of administrative convenience, to include the required certification in Form 346 for low power television applications. This will be accomplished in another proceeding. Until that time, certification can be accomplished by amendment, for those already on file, or by attachment, for new applications. The low power application also will be amended to include claims for the preferences.

21468, 21490 (May 18, 1982). We propose, consistent with the legislative history, that the same rule be retained in the lottery context, with respect to applications for low power stations. With respect to other media of mass communications, we propose to apply our present anti-trafficking rules. We encourage public comment on the accuracy of this interpretation of the Conference Report.

*Amendments to Applications*

32. In order to ensure that lottery selection percentages are accurate and that the purposes of the statutory preference scheme are achieved, each applicant has an affirmative duty promptly to notify the Commission and all other parties to the proceeding by amending its application to reflect any changes in ownership thereof or in the holdings of the applicant's owners in any other media of mass communications which might affect preference eligibility. For example, when an applicant for several low power licenses wins one lottery, its preference status would change in other lotteries. Thus, we propose to amend Section 1.65 of our Rules to require that notification of such changes be made within seven days of the completion of any such changes made after the application was tendered for filing up to the date on which the public notice listing all applicants for a particular lottery is released. No such amendments will be permitted to increase the selection percentage of the applicant.[25] In conducting the lottery following an amendment, the Commission shall recompute selection percentages based on the reduced preference eligibility of the applicant in question. Preference eligibility changes occurring thereafter will affect selection percentages only if a second lottery is conducted.

33. All other amendments will continue to be subject to Section 1.65 and any other pertinent portion of our Rules. However, applicants are cautioned that Section 1.65 requires the filing of amendments "as promptly as possible and in any event within 30 days. . . " 47 C.F.R. § 1.65. In keeping with the purpose of the lottery procedure to expedite the licensing process, applicants who file amendments will be expected to demonstrate full compliance with that rule (*i.e.*, that the amendment was filed as promptly as possible).[26] We solicit comments on the practicability of these proposals.

*Motions to Enlarge*

34. Similarly, parties who file motions under Section 1.229 will be expected to act expeditiously. We propose to delete that portion of Section

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[25] This is consistent with present broadcast policy, as has been recognized in the low power *Report and Order*. *See* 47 Fed. Reg. at 21482, paragraph 55.

[26] In the common carrier public mobile services, the Commission recently proposed additional rule revisions designed to streamline the procedures related to filing of amendments. *See* "Notice of Proposed Rule Making," Mimeo 31724, released Sept. 8, 1982.

1.229(b) which extends to 30 days from 15 days the period within which the filing of such motions is permitted in comparative broadcast cases insofar as it applies to applications subject to a lottery.

*Eligibility for Minority and Diversity Preferences*

35. This section of the *Notice* sets forth the Commission's proposals for initially determining the amount of minority ownership and diversity preference that should be allocable to an applicant. We request commenters to respond in detail to any and all of the following proposals.

36. If a sole proprietor applicant is a "minority," he will receive a minority preference. If he owns more than a 50% ownership interest in a medium of mass communications, that ownership interest is attributable to him for the purpose of calculating the diversity preference.

37. The Commitee Report states that the Commission shall, with respect to the diversity and minority preferences, "evaluate ownership in terms of . . . the partners in the case of a partnership." *Id.*, at 45. We interpret the quoted language literally to include both general and limited partnership interests. We seek comments on various approaches of determining partnership ownership for purposes of allocating preferences. One approach would be to evaluate the profit interests attributable to each of the general and limited partners. Under this approach, if the partnership agreement requires that more than 50% of the partnership applicant's profit be paid to minority group partners, the partnership applicant would qualify for a minority preference. Another approach would be to analyze the capital accounts of the general and limited partners. Under this approach, if the capital accounts of the minority group partners equal more than 50% of the firm's total capital accounts, the partnership applicant would qualify for a minority preference. Comments on these and other possible approaches are sought.

38. For the purpose of determining any diversity preference eligibility, the Commission proposes to consider the media holdings of the partnership itself and the combined cognizable holdings of the partners. The Committee Report indicates that a determination of media ownership should be based on whether the applicant's owners hold a controlling interest (more than 50%) in other mass media. *See* Conference Report at 42. Based upon this guidance, we propose that if a partnership applicant's investors together own over 50% of any medium of mass communications, then that ownership interest will be attributable to the applicant. However, if the partnership applicant's principals together own 30% of medium A, 40% of medium B and 15% of medium C, the applicant will be eligible for a full diversity preference. The Commission proposes here to use a baseline of 1% for cognizable ownership interests by limited partners.[27] Thus, in a limited partnership, a limited partner must take 1% or

[27] The one percent standard is in accord with current ownership attribution benchmarks. 47 C.F.R. §§ 73.35, 73.240 and 73.636, note 3.

more of the partnership's profits before that partner's other media interests are counted. However, any ownership interest over 50% in any medium of mass communications that is held (1) by the partnership itself, or (2) individually or collectively by either limited partners that take 1% or more of the profits or general partners of the applicant will be attributable to the applicant for the purpose of determining the diversity preference. We intend to treat non-stock corporations and unincorporatd associations in a manner similar to partnerships in which each member holds an equal share.

39. The legislative history directs that trust ownership "will be evaluated in terms of the identity of the beneficiary." *Id.* at 45. Generally, we propose to treat trusts as we have proposed to treat general partnerships. If the trust itself or any individual or group of named beneficiaries from an applicant trust controls over 50% of any other media of mass communications, those ownership interests would be attributable to the trust applicant. We seek comments on whether all named beneficiaries should be treated similarly regardless of their income from the trust, or whether the Commission should evaluate only those beneficiaries that receive 1% or more of the trust income.

40. With regard to the minority ownership preference, the Commission will take into account the racial or ethnic characteristics of all of the named trust beneficiaries. If over 50% of the applicant trust's beneficiaries are minorities, the applicant trust will be entitled to a minority preference in the lottery.

41. The Committe Report directs the Commission to "evaluate ownership in terms of the beneficial owners of the corporation" for both the media ownership and minority ownership preferences. *Id.*, at 45. It is our intention to require corporate applicants seeking a lottery preference to specify the beneficial owners of the corporation. Thus, corporate applicants seeking lottery preferences will be required to certify the beneficial owners of the corporation's voting stock.

42. We propose granting a minority preference to those corporate applicants who certify at the time of application that over 50% of their voting stock is held by a minority. With regard to the diversity preference, we are proposing that only beneficial owners of 1% or more of the applicant's voting stock will be considered in determining the applicant's diversity preference. If one or more of those owning more than 1% of the corporate applicant, either individually or collectively, control more than 50% of any other medium of mass communications, then that ownership interest will be attributable to the applicant for calculating the diversity preference.

43. Consistent with our other cross ownership policies we propose to treat the other media ownership interests of the applicant as cognizable for calculating the diversity preference. However, we seek comment on whether this interpretation is consistent with the legislative history cited

above. It will be the responsibility of any applicant seeking a diversity preference to demonstrate its eligibility for such preference.

44. The diversity preference must be modified for all applicants, however, to accommodate the Committee Report's particular concern with local ownership interests. The Report notes that "the avoidance of local ownership concentration should continue to be a factor of major significance in promoting diversity in the licensing process." *Id.*, at 43. Moreover, the Report directs that "no media ownership preferences should be awarded to any applicant whose owners, when aggregated, have controlling interest (over 50 percent) in any medium of mass communications which [is licensed to serve] the community of license for which of (sic) the grant is sought." *Id.* Thus, in view of this language, we propose to make ineligible for a diversity preference, those applicants the owners of which collectively own more than 50% of a local medium of mass communications. The Commission proposes to require applicants seeking a diversity preference to certify whether they have a controlling interest in any media of mass communications licensed to serve, franchised to serve (in the case of a cable television system), or primarily serves (in the case of a daily newspaper the community wherein the license of permit is sought. *See* Conference Report at 43.

*Conclusion*

45. Authority for this proposed rulemaking is contained in Sections 1, 3, 4 (i) and (j), 303, 309 (i) and 403 of the Communications Act of 1934, as amended (49 U.S.C. § § 151–609).

46. The major objective of this proceeding is to develop a process of random selection or lottery for choosing a licensee when there is more than one application for an initial license for any use of the electromagnetic spectrum. In addition, it is intended to provide preferential treatment to groups and individuals who are minorities or who own few or no other media of mass communications.

47. The legislative history of Section 309(i), as amended, provides substantial guidance as to the structure of lottery proceedings. Commenters are urged to set forth their analyses and proposals within its context.

48. Comments on all aspects of the analysis and proposed rules in this *Notice* are encouraged. However, in preparing their submissions, commenters should bear in mind that a set of comments and reply comments have already been submitted in this docket. Commenters are *strongly urged* not to be repetitive. Due to the time constraints imposed by the statute, we do not contemplate extensions of the comment period.

49. Pursuant to applicable procedures set forth in § § 1.415 and 1.410 of the Commission's Rules, interested parties may file comments on or before November 12, 1982, and reply comments on or before December 3, 1982. All relevant and timely comments will be considered by the Com-

mission before final action is taken in this proceeding. It is our firm intention not to grant any extensions of time on the comment and reply deadlines. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

50. For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rule making until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who makes an *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy of the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See* 47 C.F.R. § 1.1231.

51. As required by Section 603 of the Regulatory Flexibility Act, the FCC has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of this Notice, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act Pub. L. No. 96–354, 94 Stat. 1164, 50 U.S.C. § 601 *et seq.* (1981).

52. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy

of their comments, an original plus eleven copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. For further information on this proceeding, contact Randy W. Thomas in the Office of the General Counsel (202) 632-6990.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

Appendix A

Initial Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 601 *et esq.*, the Commission issues the following initial regulatory flexibility analysis.

Reason for Action and Objective

The proposed action will in certain instances allow lotteries to be used instead of comparative hearings to choose among mutually exclusive competing applications for a license. This proposal also grants a preference to groups and individuals who are minorities or who own few or no other media of mass communications. This action is expected to greatly lower the cost and speed the process of granting licenses in mutually exclusive cases.

Legal Basis

The authority for this proposed rulemaking is contained in Sections 1, 3, 4(i) and (j), 303, 309 and 403 of the Communications Act of 1934, as amended (47 U.S.C. §§ 151–609).

Small Entities Affected

The proposed action will substitute lotteries for comparative hearings as a way to choose among mutually exclusive competing applicants for certain telecommunications licenses. It will also give a preference to minorities and those who own few or no other media of mass communications.

Existing and potential applicants for FCC licenses range in size from single individuals and small partnerships to large multi-million dollar corporations. This proposal is expected to decrease the legal and administrative costs of applying for a license. Hence many small businesses and non-profit organizations which have not applied for licenses in the past may see this as an opportunity to enter the communications business and may now apply for licenses. Therefore, we expect that we may have many more applicants for some kinds of license than we did in the past.

Specific Alternatives that Could Accomplish the Same Objectives

At least two alternatives exist to the lottery proposal. One would be to retain the present comparative hearing process. Another alternative to using lotteries to choose among appli-

cants for licenses would be to auction off those licenses to the highest bidder. However, the Commission does not appear to have statutory authority to hold an auction. The Congress has directed the Commission to implement a licensing lottery. Hence, there is no known alternative to establishing lottery procedures at the present time.

Relevant Federal Rules That May Conflict, Duplicate or Overlap the Proposed Rule.

The proposed action involves modifying a number of Commission rules; to our knowledge there is no Federal rule that conflicts with, duplicate or overlap the proposals made in this Notice.

Reporting, Record-keeping and Compliance Requirements

The rule changes discussed in this proposal, if adopted, will have some attendant paperwork requirements. Applicants seeking a preference in the lottery will be required to certify to the Commission their eligibility for the preferences sought. In addition, the statute authorizing a lottery specifies that the Commission "shall have authority to require" qualified applicants to submit "such information as may be necessary to enable the Commission to make a determination regarding whether such applicant shall be granted such preference." 47 U.S.C. § 309(i)(3)(B). Thus, applicants seeking a lottery preference will be required to comply with the Commission's definitional regulations specifying preference eligibility and retain such records as may be necessary to demonstrate eligibility for the preference.

Appendix B

Proposed Rules

PART 1—PRACTICE AND PROCEDURE[28]

*Subpart F Private Radio Services Applications and Proceedings*

§ 1.953 [Amended]

In Section 1.953, paragraph (a) is amended by adding after "Applications are processed in sequence according to date of filing" the words "or pursuant to the system of random selection prescribed in § 1.972 and ___ of this part", to read as follows:

§ 1.953 How applications are processed

(a) Applications are processed in sequence according to date of filing, or pursuant to the system of random selection prescribed in §§ 1.972 and ___ of this part. Applications which are in accordance with the provisions of this chapter and established policies of the Commission may be processed to completion in accordance with the applicable delegations of authority as set forth in Part 0 of this chapter.

* * * * * *

§ 1.972 [New]

A new Section 1.972 concerning grants by random selection is added to read as follows:

§ 1.972 Grants by random selection

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[28] Corresponding changes to other Part 1 sections will be made, as appropriate at the conclusion of this proceeding.

(a) The provisions of this section, including provisions incorporated by reference, shall apply to applications for initial licenses:

(i) for stations in the following Private Radio Services:

Part 81— Stations on Land in the Maritime Services (Public Coast Stations)

Part 87— Aviation Services (Aeronautical Advisory Stations, i.e. UNICOM stations)

Part 90— Private Land Mobile Services

Part 94— Private Operational-Fixed Microwave Services

(ii) In any other proceedings in the Private Radio Services in which the Commission determines that there is no material difference in competing applicants' abilities to serve the public interests.

(b) Applications in the services specified above shall be tendered, filed, accepted or dismissed, publicly noted, and subject to Petitions to Deny in accordance with Section 1.962 and the rules established for each respective service.

(c) If there are mutually exclusive applications for an initial license for stations subject to Part 81 or Part 87, or if there are more applications for initial licenses in Part 90 or Part 94 than can be accommodated on available frequencies, the Commission may process the applications pursuant to a system of random selection. Each such random selection shall be conducted under the direction of the Chief of the Private Radio Bureau. The selection percentages, preferences, and probability calculations prescribed in Section 1.1621 et seq. of this part shall not be applicable to any system or random selection conducted in the Private Radio Bureau. Following the random selection, the Commission shall announce the tentative selectee and determine whether the tentative selectee is qualified to receive the license under the rules applicable to the respective service. Where authorized under Section 1.962, Petitions to Deny which have been filed against the tentative selectee will be reviewed and processed prior to grant, in accordance with Section 1.962 and those rules applicable to each respective service. If the Commission determines that the tentative selectee has satisfied all requirements, it shall grant the application. If the Commission is unable to make such a determination, it shall order that another random selection be conducted from among the remaining applicants. If the Commission determines that a substantial and material question of fact exists, it shall designate the question for hearing. Hearing may be conducted by the Commission or the Chief of the Private Radio Bureau, or, in the case of a question which requires oral testimony for its resolution, an Administrative Law Judge.

* * * * * *

§ 1.973 [Amended]

Section 1.973 is amended by removing out-dated language and adding a provision concerning random selection, to read as follows:

§ 1.973 Designation for hearing.

(a) If the Commission is unable to make the findings prescribed in § 1.971(a) and does not utilize the system of random selection prescribed in § 1.972 of this part, it will formally designate the application for hearing on the grounds or reasons then obtaining and will notify forth-with the applicant and all other known parties in interest of such action.

(b) Orders designating applications for hearing will specify with particularity the matters and things in issue and will not include issues or requirements phrased generally.

(c) Parties in interest, if any, who are not notified by the Commission of its action in designating a particular application for hearing may acquire the status of a party to the proceeding by filing a petition for intervention showing the basis of their interest not more than 30 days after publication in the Federal Register of the hearing issues or any substantial amendment thereto.

(d) Any hearing subsequently held upon such applications shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. Hearings may be conducted by the Commission or by the Chief of the Private Radio Bureau, or, in the case of a question which requires oral testimony for its resolution, an Administrative Law Judge. The burden of proceeding with the introduction of evidence and burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

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*Subpart L—Random Selection Procedures For Mass Media Services* [New]

General Procedures

1.1601 Scope

I. The provisions of this subpart, including provisions incorporated by reference, shall apply to applications for initial licenses or construction permits in

(a) the following services:
Low Power Television Broadcasting

(b) any other proceeding in which the Commission determines that there is no material difference in certain competing applicant's ability to serve the public interest.

1.1602 Designation for Random Selection

(a) Applications in the services specified in Section 1.1601 shall be tendered, accepted or dismissed, filed, publicly noted and subject to random selection and hearing in accordance with the rules established for the pertinent class of service. Competing applications for an initial license or construction permit shall be designated for random selection and hearing in accordance with the procedures set forth below.

(b) Where, after hearing, the Commission determines that there are no material differences in certain competing applicant's ability to serve the public interest, it shall designate their applications for random selection. In such situations, the provisions of 1.1604 shall not apply.

1.1603 Conduct of Random Selection

(a) Each random selection shall be conducted under the direction of the Chief of the appropriate Bureau.

(b) The random selection probabilities will be calculated in accordance with the formula set out in rules 1.1621–1.1623. The Chief of the appropriate Bureau shall certify such probabilities are accurate.

1.1604 Post-Selection Hearings

(a) Following the random selection, the Commission shall announce the tentative selectee and, where otherwise permitted, invite petitions to deny its application. Following the responsive pleadings thereto, the Commission shall:

(1) in the case of low power television stations, take action pursuant to either rule 73.3591, 73.3592 or 73.3593,

(b) If, after such hearing as may be necessary, the Commission determines that the tentative selectee has met the requirements of rule 73.3591(a) it will make the appropriate grant. If the Commission is unable to make such a determination, it shall order that another random selection be conducted from among the remaining mutually exclusive applicants, in accordance with the provisions of this subpart.

(c) If, on the basis of the papers before it, the Commission determines that a substantial and material question of fact exists, it shall designate that question for hearing. Hearings may be conducted by the Commission or the appropriate Bureau Chief, or, in the case of a question which requires oral testimony for its resolution, an Administrative Law Judge.

Selection Percentages

1.1621 Definitions

(a) Medium of Mass Communications means

(1) a daily newspaper,[29] and a license or construction permit for

(2) a television (including low power) station,

(3) a standard (AM) radio station,

(4) an FM radio station,

(5) a multipoint distribution system,

(6) a direct broadcast satellite transponder, and

(7) a cable television system.

(b) Minority Group means

(1) Blacks,

(2) Hispanics,

(3) American Indians,

(4) Alaska Natives,

(5) Asians, and

(6) Pacific Islanders.

[29] For purpose of this definition, a daily newspaper is one which is published four or more days per week, which is in the English language, and which is circulated generally in the community of publication. A college newspaper is not considered as being circulated generally. *See* 47 C.F.R. §§ 73.35, 73.240 and 73.636, note 10 (1981).

(c) Owner means the applicant and any individual, partnership, unincorporated association, or corporation who

(1) if the applicant is a proprietorship, is the proprietor,

(2) if the applicant is a partnership, holds a partnership interest,[30]

(3) if the applicant is a trust, is the beneficiary thereof,

(4) if the applicant is an unincorporated association or non-stock corporation, is a member, or

(5) if the applicant is a stock corporation, holds voting shares.**

1.1622 Preferences

(a) Any applicant desiring a preference in the random selection shall so indicate as part of its application. Such an applicant shall list any owner who owns all or part of a medium of mass communications or who is a member of a minority group, together with a precise identification of the ownership interest held in such medium of mass communications or name of the minority group, respectively. Such an applicant shall also state whether more than 50% of the ownership interests in it are held by members of minority groups and the number of media of mass communications more than 50% of whose ownership interests are held by its owners.

(b) Preference factors as incorporated in the percentage calculations in rule 1.1623, shall be granted as follows:

(1) Applicants, more than 50% of whose ownership interets are held by members of minority groups—2:1.

(2) Applicants whose owners hold more than 50% of the ownership interests in no other media of mass communications—2:1.

(3) Applicants whose owners hold more than 50% of the ownership interest in one, two or three other media of mass communications—1.5:1.

(c) Applicants may receive preferences pursuant to § 1.1622(b)(1) and either § 1.1622(b)(2) or (b)(3).

(d) Preferences will be determined on the basis of applicants' ownership as of the date of the most recent Public Notice which lists all applications acceptable for filing, except where modified by an amendment to an application filed prior to the cut-off date specified in such Public Notice which reduces the applicant's preference eligibility.

(e) No preferences pursuant to § 1.1622(b)(2) or (b)(3) shall be granted to an applicant whose owners control more than 50% of a medium of mass communication which is licensed or franchised to serve or, in the case of a newspaper, primarily serves the community for which the license is sought.

1.1623 Probability Calculation

(a) All calculations shall be computed to three significant digits.

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[30] For purposes of applying the diversity preference to limited partnerships and corporations only the other ownership interests of limited partners or stockholders with a 1% or more interest in the corporation or profits of the partnership will be cognizable.

(b) Divide the total number of applicants into 1.00 to determine pre-preference probabilities.

(c) Multiply each applicant's pre-preference probability by the applicable preference from rule 1.1622(b)(2) or (b)(3).

(d) Divide each applicant's probability pursuant to (c) by the sum of such probabilities to determine intermediate probabilities.

(e) Add the intermediate probabilities of all applicants who received a preference pursuant to rule 1.1622(b)(2) or (b)(3).

(f) (1) If the sum pursuant to (e) is less than .40, then multiply each such intermediate probability by the ratio of .40 to such sum. Divide .60 by the number of applicants who did not receive a preference pursuant to rule 1.1622(b)(2) or (b)(3) to determine their new intermediate probabilities.

(2)If the sum pursuant to (e) is .40 or greater, take no action.

(g) Multiply each applicant's probability pursuant to (f) by the applicable preference ratio from rule 1.1622(b)(1).

(h) Divide each applicant's probability pursuant to (g) by the sum of such probabilities to determine the final selection percentage.

*Common Carrier Mobile Service Rules*

47 CFR § 22.23(a)[31] is amended to read as follows:

§ 22.23 Amendment of applications.

(a) Amendments as of right.

A pending application may be amended as a matter of right within 90 days from the filing date of the application, provided that:

(1) Amendments shall comply with § 22.29, as applicable; and

(2) No amendment to an application will be permitted after a petition to deny has been filed unless the amendment responds to all objections raised in all petitions such that any petitions may be dismissed.

47 CFR § 22.23(b) is amended by deleting "or comparative evaluation" and by substituting "or selected under the random selection process," to read as follows:

(b) The Commission or the presiding officer may grant requests to amend an application designated for hearing or selected under the random selection process only if a written petition demonstrating good cause is submitted and properly served upon the parties of record.

47 CFR § 22.28(a) is amended by deleting ". . . either . . ., or prior to selection of the comparative evaluation procedure of § 22.35 . . .," to read as follows:

(a) Except as provided under § 22.29, any application may be dismissed without prejudice as a matter of right if the applicant requests its dismissal prior to designation for hearing. An applicant's request for the return of his application after it has been accepted for filing will be considered to be a request for dismissal

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[31] The language in § 22.23 tracks CC Docket 80–57, which revises and updates various rule sections in Part 22. *See Notice of Proposed Rulemaking*, Mimeo 31724, released Sept. 8, 1982.

without prejudice. Requests for dismissal shall comply with the provisions of § 22.29 as appropriate.

47 CFR § 22.28(b) is amended by deleting, in the first sentence, the language ". . . either . . . or after selection of the comparative evaluation procedure of § 22.35," and by deleting paragraph (2) and renumbering paragraph (3) as (2), to read as follows:

(b) A request to dismiss an application without prejudice will be considered after designation for hearing only if:

(1) A written petition is submitted to the Commission and is properly served upon all parties of record; and

(2) The petition complies with the provisions of § 22.29 (whenever applicable) and demonstrates good cause.

47 CFR § 22.28(c) is amended by deleting the language ". . . or selection of the comparative procedure of § 22.35" and substituting the language". . . or after selection under the random selection process . . . ," to read as follows:

The Commission will dismiss an application for failure to prosecute or for failure to respond substantially within a specified time period to official correspondence or requests for additional information. Dismissal shall be without prejudice if made prior to designation for hearing or prior to selection under the random selection process, but dismissal may be made with prejudice for unsatisfactory compliance with § 22.29 or after designation for hearing or after selection under the random selection process.

47 CFR § 22.23(b) is amended by deleting the language, ". . . will be entitled to comparative consideration with one or more conflicting applications . . ." and substituting the language, ". . . will be included in a random selection process . . .," to read as follows:

(b) An application will be included in a random selection process only if:

* * * * *

47 CFR § 22.23(c) is amended by deleting the language, ". . . in order to be considered comparatively with B, . . ." and substituting the language". . . In order to be included in the random selection process, . . ." to read as follows:

(c) Whenever three or more applications are mutually exclusive, but not uniformly so, the earliest filed application establishes the date prescribed in paragraph (b)(2) of this section, regardless of whether or not subsequently filed applications are directly mutually exclusive with the first filed application. [For example, applications A, B and C are filed in that order. A and B are directly mutually exclusive, B and C are directly mutually exclusive. In order to be included in the random selection process, C must be filed within the "cut-off" period established by A even though C is not directly mutually exclusive with A.]

47 CFR § 22.31(e) is amended by deleting the language ". . . designated for comparative hearing, or for comparative evaluation (pursuant to § 22.35 . . ., "and substituting the language" . . . selected under the random selection process . . .," to read as follows:

(1) The application has been selected under the random selection process, and the Commission or the presiding officer accepts the amendment pursuant to § 22.23(b);

47 CFR § 22.3(e)(4) is amended by deleting the language" . . . entitled to comparative consideration of their applications . . ." and substituting ". . . entitled to participate in a random selection process . . .," to read as follows:

(4) The amendment reflects only a change in ownership or control which results from an agreement under § 22.29 whereby two or more applicants entitled to participate in a random selection process join in one or more of the existing

applications and request dismissal of their other application(s) to avoid the random selection process.

47 CFR § 22.32(b) is amended by deleting the language of subparagraph (b)(2), and substituting the language," The application is not subject to the random selection procedures set forth in Part I of this chapter," to read as follows:

(b) The grant shall be without a formal hearing if, upon consideration of the application, any pleadings or objections filed, or other matters which may be officially noticed, the Commission finds that:

(1) The application is acceptable for filing, and is in accordance with the Commission's rules, regulation, and other requirement;

(2) The application is not subject to the random selection procedures set forth in Part I of this Chapter.

47 CFR § 22.32(e) is amended by deleting sub-paragraphs (e)(3) and (e)(4), which discuss comparative hearing procedures, to read as follows:

(e) The Commission will designate an application for a formal hearing, specifying with particularity the matters and things in issue, if, upon consideration of the application, any pleadings or objections filed, or other matters which may be officially noticed, the Commission determines that:

(1) A substantial and material question of fact is presented;

(2) The Commission is unable for any reason to make the findings specified in paragraph (a) of this section and the application is acceptable for filing, complete, and in accordance with the Commission's rules, regulations, and other requirements.

47 CFR § 22.32(f) is amended by deleting the language ". . . paragraph (e) of this section after an appropriate hearing conducted in accordance with the provisions of § 22.35 or Part I of this Chapter," and substituting the language" . . . paragraph (e) or Part I of this Chapter," to read as follows:

(f) The Commission may grant, deny or take other action with respect to an application designated for a formal hearing pursuant to paragraph (e) or Part I of this Chapter.

47 CFR § 22.32(g) is amended by deleting the present language, which discusses conditional grants of mutually exclusive applications, and substituting a new paragraph (g) to read as follows:

(g) *Random selection procedure.* Where two more applications are mutually exclusive as set forth in § 22.21, the random selection procedure shall apply as set forth in Part I of this Chapter, except that cellular applications shall be considered as set forth in subpart K of this part.

47 CFR § 22.35 is deleted and reserved. This rule, which discusses an optional procedure related to comparative proceedings, is rendered obsolete by the random selection process. Rules § 22.35 will therefore be eliminated.

Section 73.3591, Grants without Hearing, will be revised to add the following:

(d) In the case of mutually exclusive low power television applications, the FCC will use the process of random selection set forth in Section 1. _____ to resolve the mutual exclusivity. If the FCC is subsequently unable to make all the findings specified in paragraph (a) of this section in favor of the applicant selected, it will designate the application for hearing.

Section 73.3593 will be revised as follows:

§ 73.3593 Designation for hearing.

If the FCC is unable, in the case of any application for an instrument of authorization, (except in the case of low power television) to make the findings specified in § 73.3591(a), it will formally designate the application for hearing as set forth in § 1.221. In the case of low power television applications, if after random selection (see Section 73.3591[d]) or in the case of a single applicant, the FCC is unable to make all the findings specified in Section 73.3591(a), it will designate the application for paper hearing as set forth in Section 1.221. If, after culmination of the paper hearing, the FCC determines that oral testimony is necessary, the FCC will designate the application for oral hearing for purposes of cross examination. In designating an application for hearing, the FCC will notify the applicant and all known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally.

PART 81 *(Stations on Land in the Maritime Services)*

§ 81.51 [New]

A new Section 81.51 concerning grants by random selection is added to read as follows:

§ 81.51 Grants by random selection.

If there are mutually exclusive applications for an initial license under this part, the Commission may grant the applications pursuant to the system of random selection prescribed in §§ 1.972 of this chapter.

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PART 87 *(Aviation Services)*

§ 87.48 [New]

A new Section 87.48 concerning grants by random selection is added to read as follows:

§ 87.48 Grants by random selection.

If there are mutually exclusive applications for an initial license under this part, the Commission may grant the applications pursuant to the system of random selection prescribed in § 1.972 of this chapter

* * * * * *

PART 90 *(Private Land Mobile Radio Services)*

§ 90.143 [Amended]

Section 90.143 is amended by adding new paragraph (b) concerning grants by random selection, and redesignating paragraph (b) as (c), to read as follows:

§ 90.143 Grants of Applications

(b) All applications in pending status will be processed in the order in which the application acceptable for filing was received by the Commission;

provided, however, that if there are more applications than can be accommodated on available frequencies, the Commission may grant the applications pursuant to the system of random selection prescribed in § 1.972 of this chapter

Redesignate paragraph (b) as (c).

PART 94 *(Private Operational-Fixed Microwave Service)*

§ 94.37 [Amended]

In Section 94.37, a new paragraph (c) concerning grants by random selection is added to read as follows:

§ 94.37 Grant of application without hearing.

* * * * * *

(c) All applications in pending status will be processed in the order in which the application acceptable for filing was received by the Commission; provided, however, that if there are more applications than can be accommodated on available frequencies, the Commission may grant the applications pursuant to the system of random selection prescribed in § 1.972 of this chapter

* * * * * *

Appendix C

Section 309(i) of the Communications Act now reads as follows:

(1) If there is more than one application for any initial license or construction permit which will involve any use of the electromagnetic spectrum, then the Commission, after determining that each such application is acceptable for filing, shall have authority to grant such license or permit to a qualified applicant through the use of a system of random selection.

(2) No license or construction permit shall be granted to an applicant selected pursuant to paragraph (1) unless the Commission determines the qualifications of such applicant pursuant to subsection (a) and section 308(b). When substantial and material questions of fact exist concerning such qualifications, the Commission shall conduct a hearing in order to make such determinations. For the purpose of making such determinations, the Commission may, by rule, and notwithstanding any other provision of law.

(A) adopt procedures for the submission of all or part of the evidence in written form;

(B) delegate the function of presiding at the taking of written evidence to Commission employees other than administrative law judges; and

(C) omit the determination required by subsection (a) with respect to any application other than the one selected pursuant to paragraph (1).

(3) (A) The Commission shall establish rules and procedures to ensure that, in the administration of any system of random selection under this subsection, used for granting licenses or construction permits for any media of mass communications, significant preference will be granted to applicants or groups of appli-

cants, the grant to which of the license or permit would increase the diversification of ownership of the media of mass communications. To further diversify the ownership of the media of mass communications, an additional significant preference shall be granted to any applicant controlled by a member or members of a minority group.

(3) (B) The Commission shall have authority to require each qualified applicant seeking a significant preference under subparagraph (A) to submit to the Commission such information as may be necessary to enable the Commission to make a determination regarding whether such applicant shall be granted such preference. Such information shall be submitted in such form, at such times, and in accordance with such procedures, as the Commission may require.

(C) For purposes of this paragraph:

(i) The term "media of mass communications" includes television, radio, cable television, multipoint distribution service, direct broadcast satellite service, and other services, the licensed facilities of which may be substantially devoted toward providing programming or other information services within the editorial control of the licensee.

(ii) The term "minority group" includes Blacks, Hispanics, American Indians, Alaska Natives, Asians, and Pacific Islanders.

(4) (A) The Commission, not later than 180 days after the effective date of the enactment of the Communications Amendments Act of 1982, shall after notice and opportunity for hearing, prescribe rules establishing a system of random selection for use by the Commission under this subsection in any instance in which the Commission, in its discretion, determines that such use is appropriate for the granting of any license or permit in accordance with paragraph (1).

(4) (B) The Commission shall have authority to amend such rules from time to the extent necessary to carry out the provisions of this subsection. Any such amendment shall be made after notice and opportunity for hearing.

Common Carrier, International
Common Carrier, Switched Data Communications Service
Data Transmission

Commission authorized Satellite Business Systems to provide digital data and videoconferencing services between the United States and the United Kingdom.
—*Satellite Business Systems*

FCC 82–422

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

| In the Matter of | |
|---|---|
| SATELLITE BUSINESS SYSTEMS | File No. I–T–C–82–093 |
| Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate lines of communication between points in the contiguous United States and points in the United Kingdom and beyond. | |

MEMORANDUM OPINION ORDER AND AUTHORIZATION

Adopted: September 23, 1982; Released: October 1, 1982

BY THE COMMISSION:

1. On January 6, 1982 Satellite Business Systems (SBS) applied for authority, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214 (1980) to acquire and operate facilities to extend its authorized domestic services to points in the United Kingdom and beyond. If authorized, SBS initially will offer a variety of high speed digital transmission private line and video-conferencing services. SBS currently provides digital communications services to users within the contiguous United States to Puerto Rico, the U.S. Virgin Islands,[1] and Canada.[2]

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[1] Satellite Business Systems 62 FCC 2d 977, *reconsideration denied*, 64 FCC 2d 872 (1977), *affirmed sub nom.*, United States v. FCC, 652 F.2d 72 (D.C. Cir. 1980).

[2] Satellite Business Systems, 88 FCC 2d 195 (1981) (authorization to use domestic satellite for transborder private line services); *see also* Transborder Satellite Video Services, 88 FCC 2d 258 (1981).

2. Several international carriers challenge the SBS application on the basis of SBS' relationship with the Communications Satellite Corporation (Comsat).[3] They request the Commission to delay action on the application until issues are resolved regarding conflicts of interest and anticompetitive conduct that they allege may result from SBS' entry into international markets.

## *I. The Application*

3. SBS applies for authority to establish, acquire and operate facilities for the provision of communications services to overseas points. SBS initially seeks authorization to lease from Comsat up to 18 digital and data satellite channels operating at various transmission rates the provision of private line data services between the United States and the United Kingdom. SBS will interconnect its domestic network with terrestrial transmission facilities that will provide lines to the Etam, West Virginia or Andover, Maine INTELSAT earth station. It will acquire satellite half-circuits from Comsat and interconnect with matching circuits of British Telecom International (BTI) for the extension of communication to the U.K. and beyond.

4. SBS states that its proposal will foster the development of high-speed data services which it and BTI have developed. SBS will initially offer digital transmission service capabilities at a variety of data speeds, and facilities suitable for international video-conferencing applications.[4] SBS intends to use digital facilities to the greatest extent feasible. However, SBS states that it will use some analog segments initially until cost-effective digital systems become more generally available.

5. SBS states that it is legally, financially, and technically qualified to enter overseas markets. It contends that the international data services marketplace, and particularly the high density U.S.-U.K. route, is ripe for additional competition. SBS also asserts that its market entry will accrue benefits for existing domestic customers as well as the public in general. SBS states that its entry will promote the potential for industry-wide downward rate pressure and service diversity. SBS claims that the establishment of a fully integrated "end-to-end" international service will afford direct routing, centralization of responsibility, and improved service to its existing domestic customers.

6. SBS projects that demand for its digital transmission services will amount to 19, 45, and 70 channels during the first three years of operation respectively:

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[3] SBS is a partnership owned by subsidiaries of Comsat, International Business Machine Corp., and Aetna Casualty and Surety Co.

[4] SBS also proposes to offer 1.544 and 2.048 megabits per second (mbps) channel in the future when Comsat makes such circuitry available.

*SBS Projected Customer Channel Usage*

| *Transmission Speed* | *Year 1* | *Year 2* | *Year 3* |
|---|---|---|---|
| 2.4 kbps (kilobits per second) | 5 | 10 | 12 |
| 4.8 kbps | 5 | 10 | 15 |
| 9.6 kbps | 5 | 15 | 25 |
| 50/56 kbps | 4 | 8 | 14 |
| 1.544/2.048 mbps (megabits per second) | 0 | 2 | 4 |
| Total Channels | 19 | 45 | 70 |

After a modest start, reflecting limited availability of terminals in the U.K., SBS projects the following volumes for occasional use, video-conferencing services:

*SBS Projected Video-conferencing Volume*
(average minutes per month)

| | *1st Quarter* | *2nd Quarter* | *3rd Quarter* | *4th Quarter* |
|---|---|---|---|---|
| Year 1 | 0 | 0 | 480 | 720 |
| Year 2 | 960 | 1800 | 2400 | 3600 |
| Year 3 | 4200 | 4800 | 5400 | 6000 |

As an indication of its commitment to establish a viable international presence, SBS plans to invest a total of $937,000 during the first three years of operation. It expects earnings of $9,000, $416,000, and $1,334,000 respectively for the first three years of operation.

## *II. Comments*

7. Comments and petitions were filed by RCA Global Communications, Inc. (RCA) and Western Union International, Inc. (WUI) SBS filed a consolidated opposition. Replies were filed by Comsat, TRT Telecommunications Corp. (TRT) and WUI. RCA, WUI, and TRT are collectively referred to herein as the International Record Carriers or the IRCs. The American Telephone and Telegraph Co. (AT&T) filed a brief comment urging resolution of the *TAT-4* voice/record dichotomy issues considered in Docket No. 80–632.[5]

### *A. IRC Comments*

8. The IRCs fear that Comsat, as a one-third owner of SBS, may confer preferential treatment to SBS thereby unfairly facilitating SBS' entry

[5] *See* Overseas Communications Services, 84 FCC 2d 622 (1980) (reviewing TAT-4 voice/record dichotomy in international services, 37 FCC 1151 (1964), and proposing to eliminate restrictions on AT&T's provision of international record services and the IRCs' provision of voice services).

into any international market. They allege that Comsat will have the ability to favor its "progeny" through preferential facilities access. The IRCs state that such special treatment can be afforded by faster response times to SBS circuit requests or the willingness of Comsat, as INTELSAT earth station facilities manager, to satisfy an SBS request for land to build to co-located domestic earth station to the potential exclusion of other competitors. In addition, the IRCs contend that Comsat will provide SBS access to INTELSAT technological information not available to SBS competitors. Such access may afford SBS an unfair headstart in planning future services and making marketing decisions.

9. Several IRCs argue that Comsat's existing corporate structure enables it to evade structural barriers established to prevent the comingling of costs and service functions. WUI states that, without adequate safeguards to segregate Comsat's statutory monopoly activities and its competitive ventures, SBS and Comsat can engage in collusive activities. WUI contends that SBS, Comsat General, and Comsat World Systems, all related to Comsat, will merely engage in "pseudo-competition" such that one or more of the family members can accrue an unfair competitive advantage over other non-affiliated competitors.

10. WUI and RCA cite Comsat's allegedly illegal bidding practices for earth stations to be located at the Hickam, Hawaii and Finegayan, Guam military installations[6] as evidence that Comsat can manipulate the pretariff bidding process to confer competitive benefits to itself and SBS. Because Comsat provides space segment capacity on a sole source basis, and serves as Earth Station Ownership Committee (ESOC)[7] facilities manager, it is alleged that Comsat may be in the position to discriminate in handling space segment and earth station service requests or alter circuitry demand projections and assumptions to devise discriminatory price quotations.

11. The IRCs state that SBS' overseas services may compete with INTELSAT services. They allege that Comsat will have an incentive to discourage INTELSAT from serving markets which SBS seeks to enter. A conflict of interest could injure customers, other carriers and possibly

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[6] *See* Communications Satellite Corp., 80 FCC 2d 170 (1980) (denial of earth station application), *decision vacated and hearing ordered*, 86 FCC 2d 71 (1980) *initial decision*, CC Docket No. 81-353 *et al.*, FCC 81D-63, Mimeo No. 974 (released December 10, 1981) (finding Comsat's bidding practices illegal), *motion to withdraw application* (filed by Comsat, May 28, 1982).

[7] Comsat serves as the sole U.S. representative to INTELSAT and serves as the exclusive lessor or capacity (space segment) in INTELSAT satellite facilities. Access to the space segment is fostered through earth stations currently operated by the Earth Station Ownership Committee, a joint venture of Comsat, AT&T and several of the IRCs. Comsat has been afforded the right to own a 50% share in ESOC and serve as facilities manager. *See* Ownership and Operation of Earth stations, 5 FCC 2d 812 (1966); *see also* Modification of policy on ownership and operation of U.S. earth stations that operate with the INTELSAT global communications satellite system, FCC 82-372, 90 FCC 2d 1159 (released August 13, 1982).

the INTELSAT membership, particularly if Comsat succeeds in carving out markets for SBS. The IRCs contend that, without adequate safeguards, Comsat's fiduciary responsibility to its stockholders may take priority over its public interest obligations.

12. WUI and RCA request that we delay processing the application until such a time as SBS fully explains how its relationship with Comsat will not result in anticompetitive consequences that may result from Comsat's INTELSAT functions and its sole source provision of satellite facilities and earth station services to SBS and its competitors. RCA urges the Commission to adopt measures that insure fair competition by guaranteeing that SBS does not operate on terms more favorable than those applying to other international carriers not affiliated with domestic carriers. RCA recommends that the Commission require SBS to segregate itself into domestic and international subsidiaries as was required of RCA, or that RCA be freed of such an obligation.[8] RCA notes that such structural separation is necessary to insure that Comsat's corporate affiliates will deal with each other at arm's length and pursuant to publicly filed tariffs. WUI and TRT join RCA in casting doubt on the efficacy of existing structural and accounting safeguards to insure that SBS acquires Comsat-supplied services and transmission capacity on the same terms and conditions faced by similarly situated, but non-affiliated carriers.

### *B. AT&T's Comments*

13. The American Telephone and Telegraph Co. (AT&T) filed a brief comment urging our prompt resolution of a rulemaking proceeding underway to assess a policy which limits AT&T to providing primarily voice-only international services with the IRCs limited to providing primarily record services.[9] AT&T perceives SBS' proposed offerings as including both voice and record services in possible violation of existing policy.

### *C. SBS' Opposition and Other Comments*

14. SBS emphasizes that no carrier has challenged its qualifications to serve as an international carrier, or argued that the international digital services marketplace cannot tolerate competitive entry. Similarly, no carrier has argued that mere market entry by SBS will constitute a disservice to the public interest. SBS and Comsat both contend that the IRCs and AT&T raise superfluous or peripheral matters which do not alter SBS' premise that it can accord tangible benefits to users by introducing new services, promoting the efficient use of existing facilities, augmenting customer choice, and creating a downward pressure on rates.

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[8] The Commission has recently removed the separate domestic and international subsidiary requirements for RCA and ITT. *See* United States Transmission Systems, Inc., *et al.*, FCC 82-402, Mimeo no. 32025 (released August 31, 1982), 91 FCC 2d 329.

[9] *See* Overseas Communications Services, 84 FCC 2d 622 (1980), *supra*, n. 5.

15. SBS rejects the notion that Comsat's minority ownership interest in it will generate unfair competitive advantages. SBS only expects to receive equal, non-discriminatory treatment from Comsat. SBS asserts that the arm's length relationship established between it and Comsat as a condition to its authorization to provide domestic services will assure that Comsat does not give it preferential treatment. SBS claims that the nature of its three-member partnership prevents self-serving dominance by any one participant. SBS cannot merely serve as an extension of Comsat to the potential detriment of the partnership's overall well-being. SBS contends that it is structured to deal with Comsat as would any other similarly situated, non-affiliated carrier. Accordingly, SBS cannot render itself victim to Comsat's potentially conflicting goals and incentives, nor can Comsat confer preferential treatment on SBS. It will obtain INTELSAT space segment and technical operating information from Comsat, in the same manner as other competitors. Because SBS must acquire capacity pursuant to tariff and since INTELSAT-supplied information generally is made available to the public, SBS rejects any notion that somehow it can acquire an unfair competitive edge vis-a-vis other carriers not affiliated with Comsat to any degree.

16. SBS fails to see how any potential conflict of interest will result from its international ventures. It does not plan to launch its own international services satellite. Therefore, SBS contends that it will not carry international traffic in direct competition with INTELSAT. Also, SBS does not foresee a situation where it will seek to provide the same type of digital business communications services that INTELSAT might also consider offering, with or without Comsat's endorsement.

17. On the need for creation of a separate subsidiary, SBS contends that no unfair competitive advantage will accrue from its consolidated operations. SBS argues that its limited market entry and provision of a specialized range of international services to one foreign locale militates against the imposition of a structural remedy designed to prevent anti-competitive conduct among the consolidated operations of a major established carrier.

18. In response to AT&T's concern over a possible violation of the *TAT-4* restriction on joint provision of voice and record services, SBS indicates that it only plans to offer an improved alternate voice/data type of service. While acknowledging that some of its data transmission speeds are technically compatible for voice carriage, SBS notes that it will not separately offer international voice-only services. SBS customers will make an election on how to maximize the use of transmission capacity, a practice which conforms with the existing *TAT-4* policy.

19. In its reply comments WUI repeats its arguments that SBS' application is not ripe for our consideration because of unresolved preferential treatment, conflicts of interest, and anticompetitive conduct allega-

tions. TRT argues that the domestic authorization of SBS and subsequent judicial approval should not affect our independent evaluation of SBS' international application. Additional conflicts generated by Comsat's international operations and responsibilities militate against the notion that SBS should be free to expand into any new market.

## *II. Discussion*

20. We believe that authorization of SBS to provide the proposed international service is in the public interest. We reach this conclusion after evaluation of SBS' application and the comments of the other parties, including the expressed concern that SBS corporate relationship with Comsat would give it an unfair competitive advantage, or generate untenable conflicts of interest.

### *A. Section 214 Evaluation*

21. Section 214 of the Communications Act requires the Commission to certify that an extension of lines of communication by a carrier is required by the public convenience and necessity. As part of our evaluation under this provision, the Commission must review an applicant's legal, financial and technical qualifications to provide service as a common carrier. In addition, the Commission must determine whether competition is reasonably feasible in those markets sought to be served and that added competition is in the public interest. *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953).[10] As interpreted by the Commission, "feasibility of competition depends on whether there is sufficient traffic to support the addition of another competing direct circuit and upon the effect of opening of such circuit upon the applicant as well as all other carriers providing service to the public." *Mackay Radio and Telegraph Co.*, 28 FCC 231 (1960). In determining whether added competition is in the public interest, "the Commission is not required to make specific findings of tangible benefits . . . but the Commission must at least warrant . . . that competition would serve some beneficial purpose such as maintaining good service and improving it." 346 U.S. at 96–7.

22. No party challenges SBS' legal, financial and technical qualifications to provide overseas communications services. SBS is already a Commission licensee for service to domestic points and Canada. It has

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[10] The Commission recently determined that because the Record Carrier Competition Act of 1981 (RCCA) holds that competition in record communications services markets is in the public interest, there is no need to assess whether competition is feasible and in the public interest in acting on future record services applications. *See* The Western Union Telegraph Co., FCC 82–378, Mimeo No. 31938 (released August 12, 1982) 91 FCC 2d—, (application for review pending) (authorization of Western Union international record service). We need not decide whether Congress intended passage of the RCCA to alter the *RCA* standard for high speed data communications services, because SBS' proposed services clearly satisfy the more rigorous *RCA* test.

already demonstrated its technical expertise in providing digital satellite services in the domestic market, and the record indicates that SBS has the financial wherewithal to commit the necessary funds for development of viable overseas services.

23. Similarly, no party challenges the feasibility of competition in the expanding markets that SBS seeks to serve, or argues that SBS' entry will not result in public benefits. We find that the present marketplace for overseas digital data services will support the addition of a new competitor.[11] In addition, we find that added competition will be in the public interest. In authorizing SBS to provide digital services to Canada via its domestic system, we found that "a single integrated [SBS] telecommunications network capable of serving . . . geographically dispersed locations," benefits customers with services provided "in a more efficient, more economical, and more reliable manner."[12] We believe that the further expansion of SBS into international services will similarly enhance the efficiency and productivity of SBS' integrated network by providing its users with greater opportunities for expeditious exchange of information within their organizations. We also believe this further expansion of SBS will stimulate the development of digital services in overseas markets by offering broader customer choice of available digital services.[13] Under appropriate safeguards, SBS' entry into overseas markets, on the basis of unrefuted traffic and revenue projections satisfies "a reasonable expectation that such competition will be in the public interest."[14]

24. TRT correctly points out that SBS does not propose to offer initially a service currently unavailable to the public.[15] Existing carriers already

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[11] The size of the international digital data communication market is illustrated by our recent authorization for the IRCs to provide up to 131 medium speed channels (2400–50,000 bits per second) for discrete data services to various locales served by INTELSAT Atlantic Ocean Region satellites. Additionally, a substantial percentage of existing leased private line channels provide Alternate Voice/Data services, which by definition are data compatible. The Commission's policy to encourage availability of data services for both small and large users will be supported by a grant of SBS' application.

[12] Satellite Business Systems, 88 FCC 2d 195, 208 (1981) (authorization to use SBS domestic satellite for service between the U.S. and Canada).

[13] The Commission has found in a number of proceedings that market entry fosters the prospect for the introduction of one or more new services, the more efficient use of existing facilities, and augmented customer choice which clearly is beneficial to consumers. RCA Global Communications *et al.*, 88 FCC 2d 905, 911 (1982) (authorization of IRCs to provide wholly domestic record services). *See also*, Graphnet, Inc. 63 FCC 2d 402, *reconsideration denied*, 67 FCC 2d 1020 (1978), *affirmed in part sub nom*, ITT World Communications, Inc. v, FCC, 595 F.2d 697 (2d Cir. 1979), *on remand*, 71 FCC 2d 1066 (1979); International Relay, Inc., 77 FCC 2d 819 (1980), *on reconsideration*, 82 FCC 2d 41 (1980); Tymnet, Inc., File No. I–T–C–81–210, Mimeo no. 3223 (released March 8, 1982); GTE Telenet Communications Corp., File No. I–T–C–82–274, Mimeo no. 2765 (released March 15, 1982) (international packet-switching over leased lines), *on reconsideration*, FCC 82–377, Mimeo no. 31855 (released August 25, 1982), 91 FCC 2d 232.

[14] TRT Telecommunications Corp., 46 FCC 2d 1042, 1050 (1974) (authorization of TRT as the fifth carrier to provide record service between the U.S. and the United Kingdom granted since competition was deemed reasonably feasible).

[15] TRT indicates that it too will offer the 1.544/2.048 mbps services proposed by SBS as soon as Comsat tariffs such capacity. *See supra*, n.4.

offer medium speed transmission services which SBS proposes to offer. However, the Commission need not be presented with an application for an entirely new service. We are only required to warrant, as we have, that public benefits will result from entry of a new carrier. We can foresee that SBS' entry into overseas markets will foster the prospect of greater customer choice and downward rate pressure.

*B. Other Issues*

25. The IRCs have raised other arguments going to our Section 214 public interest evaluation. First, we reject the IRCs' allegations that SBS will have competitive advantages which require us either to deny or delay action on SBS' application. The IRCs' claim that Comsat will give special treatment to SBS is speculative. As a common carrier subject to Title II of the Communications Act,[16] Comsat must provide facilities to all carriers on a nondiscriminatory basis and is subject to statutory penalties if it fails to obey this requirement. The Communications Act further provides carriers with the means to bring specific complaints of violations before the Commission and to request relief.[17]

26. Moreover, the IRCs' contention that Comsat may provide INTELSAT/INMARSAT information to SBS to the exclusion of SBS' competitors has been resolved in the Commission's recent *Comsat Structure* decision. The Commission has ordered Comsat to take steps to provide for greater dissemination of the INTELSAT/INMARSAT information.[18] The Commission decided that, as a general rule, Comsat may not make INTELSAT/INMARSAT information available to its affiliates if such information is not otherwise available to competitors and the general public under the same terms and conditions. The Commission also required Comsat to develop accounting and reporting requirements to assure that Comsat properly identifies and allocates corporate administrative and Comsat Labs research and development costs. Similarly, Commission action in conditioning its domestic authorization of SBS[19] should alleviate IRC fears of "co-mingling" of costs between Comsat's monopoly and competitive ventures.

27. The IRCs also allege that Comsat and SBS will manipulate the pretariff bidding process to confer advantages to SBS in competing for

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[16] In performing its INTELSAT role, Comsat is deemed a common carrier within the meaning of the Communications Act and "fully subject to the provision of Title II and Title III of that Act." Communications Satellite Act of 1962, Section 401, 47 U.S.C. § 741 (1980).

[17] Section 202 of the Communications Act makes it unlawful for any common carrier "to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services . . ., or to make or give any undue or unreasonable preference or advantage . . .," and Section 208 establishes a procedure under which complaints of such carrier practices may be presented to the Commission for investigation.

[18] Changes in the corporate structure and operations of the Communications Satellite Corporation, CC Docket No. 80–634, FCC 82–372, at paragraphs 74–99 (released August 13, 1982), 90 FCC 2d 1159.

[19] Satellite Business Systems, 62 FCC 2d at 1044.

satellite services contracts, citing the decision of the administrative law judge in *Communications Satellite Corp., supra* n.6. Assuming that the ALJ's findings are affirmed by the Commission,[20] and based on the information now before us, we find that there is no reason to delay or impose conditions upon SBS' authorization, because we believe that there are adequate safeguards to prevent SBS from engaging in such practices. The approved partnership for SBS, the requirement that SBS deal with Comsat at arm's length, the requirement that SBS comply with Title II of the Communications Act, and our powers under the Act will be adequate to guard against this potential misconduct.

28. We are sensitive to the IRCs concern that SBS' entry into overseas markets may result in conflicts of interest for Comsat if INTELSAT decides to provide services that would compete with SBS offerings. We recognized this possibility in the Comsat Study.[21] However, a conflict of interest problem is not presented by this application. SBS will provide services over the INTELSAT system by leasing circuits from Comsat as do other U.S. carriers. As the sole United States representative to INTELSAT, Comsat bears special fiduciary obligations as specified by the Communications Satellite Act of 1962. In complying with its statutory obligations, Comsat must confer with the Department of State, the Department of Commerce, and the Commission on how it shall cast its votes on INTELSAT matters which involve trade, foreign policy, or major facilities investment matters which impact U.S. governmental policies.[22] This "instructional process" involves agency review of proposals made to the INTELSAT Board of Governors and assessment of whether the interests of the United States will be served by the vote that Comsat proposes to cast. We believe that this process establishes a mechanism by which the Commission and other agencies can guard against Comsat pursuing the interests of SBS at the expense of its INTELSAT obligations.[23]

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[20] We make this assumption without in any way prejudging our review of the ALJ's findings in that proceeding.

[21] Communications Satellite Corporation 77 FCC 2d 564, 638 (1980).

[22] *See* Transfer of Telecommunications Functions, Exec. Ord. No. 12046, 43 Fed. Reg. 13349 *et seq.* (March 27, 1978) (delineation of responsibilities of various government agencies). Section 209(c)(9)(10) of the Communications Satellite Act of 1962 requires Comsat to file applications pursuant to Section 214 of the Communications Act for authority to participate in INTELSAT facilities procurement programs. *See* Statement of Policy Concerning Procedures Applicable to Comsat's Applying for Commission Authorization to Participate in Certain Intelsat Activities, 46 FCC 2d 338 (1974) (establishing a timetable for Comsat's filing of applications for FCC review, including "modifications not involving substantial investment by Comsat to on-going, INTELSAT programs for which Comsat's participation has been authorized").

[23] The fact that Comsat no longer has a controlling interest in INTELSAT provides an additional check against its pursuit of actions that may not be in INTELSAT's interest. Comsat presently has a 24 percent voting share in INTELSAT.

29. The IRCs are also concerned that Comsat will give SBS exclusive access to ESOC property to build domestic earth stations or other facilities that are colocated with ESOC stations. SBS does not propose a colocated station in this application,[24] but states that it will install equipment in the earth station to complete terrestrial interconnection with its domestic customers.[25] SBS states that it ultimately expects to build a colocated domestic earth station on ESOC property.

30. The Commission recently considered this subject when it dismissed the applications of Comsat to construct multiple-beam Torus antennas at several international earth station sites. Holding that such antennas would operate as domestic facilities, thereby limiting Comsat to participation by its domestic subsidiary, the Commission also required that Comsat provide other carriers the same access privileges afforded any Comsat subsidiary.[26] Comsat has informed the Commission of its intention to develop a comprehensive plan that will set aside a designated area at each INTELSAT earth station for the construction and operation by other entities of facilities to interconnect their domestic satellite and terrestrial systems at these earth stations.[27] Similarly, we expect SBS and Comsat to comply with such a fully nondiscriminatory access plan.

31. We disagree with the IRCs that the current separation of Comsat's monopoly and competitive activities is inadequate to prevent anticompetitive behavior if SBS enters overseas markets. The Commission has devised structural, accounting, and operational restrictions and require-

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[24] SBS states that "[i]nitially, SBS' customer networks will be connected via terrestrial transmission facilities to SBS facilities located at the Etam, West Virginia or Andover, Maine INTELSAT earth station." A footnote in the application specifies that a terrestrial line will connect the INTELSAT earth station with the closest point on the customer's SBS network to secure international access for all points within the customer's network.

[25] In International Record Carrier's Scope of Operation (Gateways), 76 FCC 2d 115 (1980), *reconsideration denied*, 80 FCC 2d 303, *affirmed sub nom.*, Western Union Telegraph Co. v. FCC, 665 F.2d 1126 (D.C. Cir. 1981), the Commission conditionally authorized the IRCs to establish gateways at the four U.S. INTELSAT earth stations for the interconnection of equipment to be used in international private line and special services. The Commission required that Comsat and the IRCs file a plan to insure nondiscriminatory access by all authorized carriers, 76 FCC 2d at 148. Section 13 of the Carrier's Memorandum of Understanding accepted in an Order, Mimeo No. 33141, (released July 3, 1980), *erratum*, Mimeo no. 33598, (released July 14, 1980), affords "[a]dditional carriers authorized by the Commission . . . [the right] to obtain the services set forth in this Agreement under equal terms and conditions. . . ." SBS was afforded access to the ESOC INTELSAT earth stations pursuant to this section.

[26] Communications Satellite Corp., *et al.*, FCC 82–376, mimeo no. 31467 File Nos. 1479–CSG–P–79 *et al.*, (released August 11, 1982). (hereinafter cited as Torus Order). We held that "before we can approve participation by any domestic affiliate of Comsat in the ownership and/or operation of the Torus facilities, Comsat must demonstrate that other carriers will be afforded non-discriminatory, diverse, and flexible access for their domestic facilities on the INTELSAT sites in accordance with our domestic satellite policies." Torus Order at 11.

[27] The Commission expressly reserved "the right to impose conditions on the authorization of a domestic facility accessing the site to insure that our access policies are achieved. . . . Until the details of . . . [such] access provisions are approved any applicant for . . . domestic access facilities should address how its proposal satisfies this concern." Torus Order at 12.

ments to insure that Comsat will not derogate its statutory INTELSAT and INMARSAT duties in the pursuit of competitive market opportunities. The Commission required Comsat "to form a separate corporate subsidiary to engage in any domestic satellite venture. . . ."[28] In the authorization of SBS' domestic services, we considered whether a partnership structure comprised of participants, active in related industries, might foster anticompetitive effects, or preempt other enterprises from entering satellite service markets. We declined to defer the application in the hope that other enterprises could start on a similarly strong footing. We concluded that the potential for SBS to commit predatory and anticompetitive acts can be checked, given structural safeguards and SBS' designation as "a comprehensively regulated common carrier subject to the restraints and sanctions of the Communications Act and other statutes which the Commission enforces."[29] Further safeguards have been instituted by the Commission's recent *Comsat Structure* decision, which requires Comsat to establish appropriate cost allocation, accounting and reporting systems to insure that it cannot misallocate costs between its monopoly and competitive activities. In view of the various measures taken by the Commission, there is no need to either deny or delay action on this application.

32. Finally, SBS' initial services will not provide a combination of voice and record services that violates the *TAT-4* policy[30] as AT&T fears. SBS will offer a set of alternate voice/data (AVD)[31] services in which the customer elects how to maximize use of private line transmission capacity. This practice comports with the existing *TAT-4* policy because the carrier has not made the line more compatible for carriage of a proscribed mode of transmission.

33. For the foregoing reasons, IT IS HEREBY CERTIFIED that the present and future public interest, convenience and necessity require the provision of international common carrier services to the general public by Satellite Business Systems between the United States and the United Kingdom and beyond.

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[28] Establishment of Domestic Communications-satellite Functions By Non-Governmental Entities, 35 FCC 2d 844, 853 (1972) (required formation of a separate corporate subsidiary to engage in any domestic satellite venture), *on reconsideration*, 38 FCC 2d 665, 684–85 (1972) (Comsat must be a minority participant in a separate corporation which does not include any representatives of AT&T or Comsat).

[29] Satellite Business Systems, 62 FCC 2d at 1095.

[30] "[W]e find and conclude that it is in the public interest that the international record carriers only, and not AT&T, should be authorized to provide leased circuits for alternate voice-record use. . . ." American Telephone and Telegraph Co., 37 FCC 2d 1151, 1160 (1964), *policy reviewed*, 84 FCC 2d 622 (1980).

[31] "The *TAT-4* case involved an essentially new service, AVD, in which the subscriber leases a voice grade private line [onto] which he may [employ devices] . . . for both voice and record communications." Inquiry Into Policy To Be Followed In Future Authorization Of Overseas Dataphone Service, 57 FCC 2d 705, 709 (1976).

34. Accordingly, IT IS ORDERED, that the application of Satellite Business Systems, File No. I–T–C–82–093, IS GRANTED and SBS is authorized to acquire the following facilities for the provision of its international common carrier services to the general public.

(1) lease from the Communications Satellite Corp. (Comsat) and operate up to eighteen data service channels and digital data satellite communications service (DIGISAT) channels as specified in Appendix A between an appropriate earth station on the east coast of North America and the appropriate Atlantic Basin INTELSAT satellite for the provision of telecommunications services between the contiguous United States and the United Kingdom and beyond;

(2) obtain from COMSAT occasional use international Television Service channels with associated audio channels[32] between an appropriate earth station on the east coast of North America and an appropriate Atlantic Basin INTELSAT satellite;

(3) acquire by lease or purchase and operate the necessary multiplex, modem, test and control equipment and install and operate or arrange for the installation and operation of such multiplex, modem, test and control equipment at the appropriate INTELSAT earth station or stations; and

(4) in accordance with the limitations of COMSAT's Tariff FCC No. 101, subdivide the DIGISAT channels identified in (1) above utilizing the multiplex identified in (3) above into digital channels of varying transmission rates when required to satisfy customer demand.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

File No. I–T–C–82–093

*Appendix A*

Data/Digital Data Channel Authorization

| *Type* | *Transmission Rate* | *No. of Channels* |
|---|---|---|
| DIGISAT (digital data satellite communication service) | 9.6 kbps (Kilobits per second) | 3 |
| DIGISAT | 50/56 kbps | 5 |
| High Speed Data | 48/50/56 kbps | 8 |
| High Speed Data | 1.544/2.048 mbps (megabits per second) | 2 |

[32] SBS is prohibited from offering a discrete voice service. However, an audio channel provided in conjunction with a teleconferencing service, provided via either occasional international television channels or digital channels is an essential component which does not violate the *TAT-4* policy.

Experimental Radio and B/c Service
Petition to Deny
Satellite Direct Broadcast

Application for authority to construct an experimental direct b/c satellite system conditionally granted. Petitions to deny denied. Petitioners reiterated earlier arguments and therefore, are unpersuasive. Motion to Stay action on first round of DBS applications denied.
—*Satellite Television Corp.*

FCC82–427

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

| | |
|---|---|
| In the Matter of | |
| In re Application of Satellite Television Corporation for Authority to Construct an Experimental Direct Broadcast Satellite System. | File No. DBS–81–01 |

MEMORANDUM OPINION AND ORDER

Adopted: September 23, 1982; Released: October 13, 1982

BY THE COMMISSION: COMMISSIONER QUELLO CONCURRING AND ISSUING A STATEMENT; COMMISSIONER JONES DISSENTING AND ISSUING A STATEMENT; COMMISSIONER RIVERA CONCURRING AND ISSUING A STATEMENT.

## *I. Introduction*

1. The Commission has before it an application filed by Satellite Television Corporation ("STC")[1] for authority to construct an experimental direct broadcast satellite (DBS) system for use in providing subscription television service to the general public.[2] The Commission also has before

[1] STC is a wholly-owned subsidiary of the Comsat Corporation, which is authorized by the Communications Satellite Act of 1962 to engage in satellite communications services.

[2] Direct broadcast satellite (DBS) service is a radiocommunication service in which signals from earth are retransmitted by high power, geostationary satellites for direct reception by small, inexpensive earth terminals. Generally, we use the term DBS when discussing domestic policy matters and the broadcasting satellite service (BSS) with regard to frequency allocation matters, in particular the Table of Frequency Allocations. In many instances, DBS and BSS are used interchangeably herein.

it various petitions to deny, comments and responsive pleadings pertaining to STC's application.[3] For the reasons discussed, *infra*, we are denying the various petitions and granting a conditional construction permit to STC[4] authorizing construction of the two satellites necessary to initiate the first phase of STC's national DBS system.[5] This initial phase is designed to provide three channels of subscription television service to an area approximately equal to that covered by the Eastern Time Zone. This action is made possible by the Commission's adoption of interim rules and procedures for DBS systems by *Report and Order* (hereafter "*Report and Order*"), 90 F.C.C. 2d 676 (1982).

2. We note that eight applications for DBS authorization[6] filed subsequent to STC's application have been accepted for filing. These subsequently filed applications will be considered by the Commission in the near future. However, nothing in this *Order* shall in any way affect the rights of any applicant sharing "cut-off" rights with STC.

3. In this initial phase of application processing, the Commission will consider and act upon the entire system proposed by each applicant, but grant construction permits only for the first phase of each of the approved systems. In this connection, it should be noted that the approval of entire systems enables the Commission to formulate definitive DBS proposals

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[3] Petitions to deny and responsive pleadings were filed by the National Association of Broadcasters ("NAB"), American Broadcasting Companies, Inc. ("ABC"), the Television Network Affiliates Association ("Affiliates"), Television Licensees ("Licensees"), Association of Maximum Service Telecasters, Inc. ("MST"), Manufacturers Radio Frequency Advisory Committee ("MRFAC"), Aerospace and Flight Test Radio Coordinating Council ("AFTRCC"), Farinon Electric Operations/Harris Corporation ("Farinon"), Association of American Railroads ("AAR"), Cleveland Associates Company ("Cleveland Associates"), Buford Television, Inc. ("Buford") and Utilities Telecommunications Council ("UTC"). Informal objections in the form of comments were filed by the Puerto Rico Mayors Association ("Mayors"), Home Box Office ("HBO") and CBS, Inc. ("CBS"). Comments favoring the application were filed by The National Telephone Cooperative Association ("NTCA"). Oppositions to petitions to deny were filed by the National Black Media Coalition ("NBMC") and STC. Also, the National Christian Network ("NCN") has filed a Motion for Stay of the processing of DBS applications.

[4] This grant is conditioned upon the outcome of the scheduled 1983 Region 2 Administrative Radio Conference (RARC–83), and subject to modification, as the Commission deems necessary, in order to comport with any other policies and rules which the Commission may hereafter conclude are necessary or appropriate in the public interest. Thus, this grant does not include launch and operational authority, or assignment of frequencies and orbital locations. These matters and requests for authorization to construct ground feeder uplink facilities will be addressed in a later proceeding(s).

[5] We are not addressing herein matters which have arisen subsequent to the deadline for filing petitions, comments and responsive pleadings relating to the STC application. Where appropriate, such matters will be addressed when applications for operational authority subsequent to RARC–83 are considered. Also, we note at the outset that many of the petitioners' objections to the STC application amount to challenges of policy conclusions reached in the DBS rule making, Gen. Docket 80–603. To that extent, these objections were or should have been filed in that that docket. Although all objections to the STC application are given full consideration here, this *Order* uses the DBS *Report and Order* as the primary point of reference for such objections and does not give exhaustive treatment to those matters which have already been resolved therein.

[6] See paragraph 9, *infra*.

that can be used by the U.S. delegation to the RARC–83 conference to present cogent and realistic arguments for the full accommodation of U.S. needs. We also believe that this approach necessarily advances the public interest by ensuring a timely and complete development of the service by DBS applicants.

4. Although approval of systems will conditionally ensure the reservation of the spectrum and orbital needs of each system as approved, subject to availability after RARC–83,[7] the construction permits granted during the initial processing phase will cover only the first operational phase of each applicant's proposal.[8] We do not consider it feasible to grant construction permits for entire systems at this time because such grants would subject applicants to unreasonable time limitations for the initiation of construction and operation of their entire DBS systems.[9] Instead, applicants should request subsequent construction permits in the form of minor modifications to their applications as they seek to complete their operations. These would be granted subject to spectrum and orbital slot availability.

5. All applicants will have a full opportunity to amend their applications after RARC–83 to ensure compliance with the resulting international agreement. Moreover, applicants are on notice that if, after RARC–83, insufficient spectrum or orbital positions are available for all the construction permits granted in the preliminary round of processing, they may face comparative hearings or other procedures for allocating available spectrum in the subsequent processing stage. Further, we repeat here our statement at paragraph 25 of the *Report and Order:* "In any event, any risk entailed by proceeding before the [RARC–83] conference lies entirely with DBS applicants."

## *II. Background*

6. The Commission began consideration of domestic policies for DBS with a *Notice of Inquiry,* 45 Fed. Reg. 72719 (November 3, 1980), in

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[7] While the Commission recognizes that it is difficult to predict the growth of a new service, such as DBS, the Commission is concerned that applicants use spectrum efficiently. Accordingly, applicants shall be required to keep the Commission informed concerning the implementation dates of their systems. Furthermore, the Commission reserves the right to assign unused spectrum to other applicants where it feels that the systems are not being implemented in a timely fashion.

[8] An operational phase of the DBS proposals among the first group of accepted applications is considered to be a distinct portion of the applicant's overall service proposal consisting of identifiable and independently operating satellites and facilities intended to serve a discrete portion of the entire proposed service area.

[9] In the *Report and Order,* at paragraph 114, the Commission adopted a "due diligence" construction policy. Under that policy, a permittee must begin construction or complete contracting for construction of its satellite station within one year of the grant of the construction permit. Thus, granting a construction permit for an entire system instead of the initial operating phase would unnecessarily restrict an applicant to a limited one year construction period for all phases of the system. However, applicants are expected to complete their systems in a timely manner.

General Docket 80–603.[10] The *Notice of Inquiry* requested comment on two staff reports dealing with DBS, one dealing with technical characteristics of DBS systems and the other with appropriate regulatory policies.[11] The *Notice of Inquiry* also requested comment on questions dealing with permanent regulatory policies and questions dealing with regulatory policies for the interim period prior to RARC–83.

7. On December 17, 1980, the Commission received STC's application requesting authority to begin construction of satellites for a satellite-to-home video broadcasting system. The Commission placed STC's application in the docket file and invited public comment on the application.

8. After consideration of the comments and replies in response to the questions dealing with interim regulatory policies, and in response to STC's application, the Commission released a *Notice of Proposed Policy Statement and Rule Making (Notice and Policy Statement)*, 86 F.C.C. 2d 719 (1981), which set forth the proposed policies and conditions to govern the authorization of interim DBS services. On June 1, 1981, the Commission found STC's application to be substantially complete and accepted it for filing (File No. DBS–81–01). The Commission also established a 45-day cut-off period for the submission of additional applications to be considered in conjunction with STC's application. Thirteen additional applications were received during this period.

9. On October 28, 1981, the Commission released a *Public Notice*, FCC 81–507, announcing that the applications submitted by the following parties were acceptable for filing: CBS, Inc. (File No. DBS–81–02); Direct Broadcast Satellite Corporation (File No. DBS–81–03); Focus Broadcast Satellite Company (File No. DBS–81–04);[12] Graphic Scaning Corporation (File No. DBS–81–05); RCA American Communications, Inc. (File No. DBS–81–06); United States Satellite Broadcasting Company (File No. DBS–81–07); Video Satellite Systems, Inc. (File No. DBS–81–08); and Western Union Telegraph Company (File No. DBS–81–09).[13]

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[10] The Commission is conducting a parallel DBS proceeding, General Docket No. 80–398, concerning Commission preparations for RARC–83. The results of this proceeding will serve as the basis for Commission coordination with the National Telecommunications and Information Administration ("NTIA") and the Department of State in the formulation of United States proposals and positions for that conference. The Commission has released three *Notices of Inquiry* and established an Advisory Committee to aid in these preparatory efforts.

[11] Bruno Pattan, *Technical Aspects Related to Direct Broadcast Satellite Systems* (Federal Communications Commission, Office of Science and Technology, September 1980); and Florence O. Setzer, Bruce A. Franca, and Nina W. Cornell, *Policies for Regulation of Direct Broadcast Satellites* (Federal Communications Commission, Office of Plans and Policy, October 1980).

[12] Only that portion of the Focus application proposing use of the Advanced Westar satellite was accepted for filing.

[13] On August 5, 1981, STC filed a petition requesting that the Commission rule on the acceptability of certain DBS applications. In response to STC's petition, the Commission released a *Memorandum Opinion and Order*, 88 F.C.C. 2d 100 (1981) finding that a number of interim DBS applications were incomplete and unacceptable for filing. In a subsequent *Memorandum Opinion and Order*, 89 F.C.C. 2d 177 (1982), the Commission reaffirmed this decision and rejected several petitions for reconsideration. An appeal of these decisions is pending. *National Christian Network, Inc.* v. *FCC*, No. 82–1345 (D.C. Cir., appeal filed March 31, 1982).

10. In its recent *Report and Order*, the Commission authorized the DBS service and established rules, policies and procedures for processing applications during the interim period before the RARC–83 conference and for operation of the service until final rules are established. Although the final rules adopted in the *Report and Order* do not follow the *Notice of Inquiry* and *Notice and Policy Statement* verbatim, sufficient congruity exists to allow the initial processing of applications on the first "cut-off list."

### *III. The STC Application*

11. STC requests classification as a broadcaster for all channels, and proposes to control all of its programming activity. The STC application includes an extensive description of the proposed national DBS system. Specifically, the application includes a description of technology, system design characteristics, construction, operation, programming, financing and marketing plans.

12. The STC application projects the cost of system construction and operation for the first year (1986–1987) to be about $683.6 million. STC plans to meet these expenses through (1) a $225 million equity contribution from Comsat, and (2) its borrowing ability and revenue sources. Chase Manhattan Bank is prepared to be a participant in a proposed commercial banking syndicate which is expected to provide STC with a $400 million line of credit. All loans to STC are to be collateralized by STC assets and recourse to Comsat in the form of an unconditional guarantee in amounts up to $170–200 million for the term of the loan. Such guarantees will not exceed the cash flow benefits available to Comsat generated by the investment tax credits and operating losses experienced by STC during the 1981–1987 period. STC expects to finance the balance of its $683.6 million expense projection through revenues earned during the first year of operations. In a letter to the Commission included with the application, Comsat states that it has the financial capability to provide $225 million in equity contributions to STC and fulfill all recourse obligations to related STC loans, and meet the capital requirements of its INTELSAT and INMARSAT participation and its other businesses for the 1981–1986 period. Comsat maintains that its net obligation to STC will not exceed its $225 million equity contribution during this period, since recourse to Comsat on STC loans will be limited to the extent of cash flow benefits that it realizes for tax losses generated by STC. Comsat expects to have $250 million available through 1986 for investment and dividend payments. Comsat points out that its capital structure is virtually debt free and estimates that equity will average $500 million over the next six years. Comsat states that a ratio of 30 percent debt total capital would provide $200 million in additional funds.

13. When fully implemented, the STC system will utilize four operating satellites[14] positioned along the geostationary arc.[15] Each of the four operating satellites will provide three channels of television service throughout the contiguous United States ("CONUS"), including service to more densely populated areas of Alaska and Hawaii. Each independently programmable satellite will serve an area in the CONUS that is roughly equal to the area covered within the existing time zones.

14. In addition to providing subscribers with three channels of television programming, STC states that its system will be capable of providing such specialized options as closed captioning for the hearing-impaired, stereophonic sound, teletext and a second language sound track. Further, STC states that the system will be capable of permitting a wide range of experimentation with high definition television services. However, STC's general transmission plan provides for high quality reception of National Television System Committee ("NTSC") color video signals with associated audio and control subcarriers.

15. Transmissions will originate at a ground station near Las Vegas that will include both a broadcast center and a system control facility. This ground station will eventually accommodate at least five 11 meter antennae to feed and control all four operating satellites. The broadcast center will provide program uplink transmissions and will have studio facilities. The control facility will provide satellite telemetry, tracking and command functions. Additional equipment will be housed at this installation for system testing. This equipment will also be used to activate home equipment of subscribers, change the level of programming to existing customers, and coordinate subscriber billing functions.

16. Broadcast signals will be transmitted directly from the satellites to small receiving antennae that typically will be mounted on the rooftops of individual subscribers' residences. The 12 GHz signals from the satellites will be received at subscribers' residences by means of home equipment with both outdoor and indoor components. The outdoor component and its attached microwave electronics ordinarily will include a receiving antenna ("dish") approximately 0.75 meter (2.5 feet) in diameter. Antennae of 0.6 meter (2 feet) and 0.9 meter (3 feet) in diameter will also be used to equalize the grade of reception at minimum cost.

17. The antenna and associated outdoor electronics will be connected by cable to indoor equipment that will be located near the subscriber's

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[14] STC plans to use Payload Assist Module-Delta (PAM–D) class satellites that are expected to operate at least seven years and generate prime DC power of approximately 1700 watts at end of life (over 2000 watts at beginning of life).

[15] STC has sought authority to position its primary operating satellites at 115° W longitude, 135° W longitude, 155° W longitude and 175° W longitude, and its two spare satellites at 115.05° W longtitude and 175.05° W longitude. It states that these locations have been selected to permit maximum satellite capacity and spectrum reuse while retaining acceptable eclipse times and elevation angles. However, as noted, *supra*, orbital slots cannot be assigned until the RARC–83 conference matters have been completed.

conventional television set. Because the proposed STC system will be supported by audience subscription fees rather than advertising, broadcast satellite transmissions will be scrambled to prevent unauthorized reception. The indoor equipment will amplify, demodulate, descramble, and remodulate the received signal to allow compatible video reception by conventional television sets. Apartment houses and other multiple dwellings normally will use a single "master" receiving antenna and equipment similar to that used for individual reception. STC's programs will also be capable of delivery to cable head ends with very simple receiving equipment.

18. The first phase of STC's system involves service from a single primary operating satellite. Transmissions from this satellite will serve an area corresponding generally to the Eastern Time Zone of the United States. The primary operating satellite will be backed up by an in-orbit spare that will facilitate an almost instantaneous restoration of service in the event of satellite technical difficulties.

### *IV. Procedural Issues*

19. Several parties take issue with the manner in which the Commission has indicated it will handle DBS applications in relation to rule makings on the DBS service and the reallocation of terrestrial microwave spectrum. Believing that the Commission might consider the STC application before the conclusion of the DBS rule making, ABC argues that such action would effectively resolve rule making issues in the adjudicatory proceeding on the application. Because we reached our rule making conclusions on the interim rules for the DBS service before consideration of the STC and other DBS applications this issue is moot.

20. Petitioners raising procedural issues also argue that the orderly processes of the Commission would be better served if all policy issues relating to the DBS service were resolved before consideration of any applications for DBS authority. Thus, ABC contends that it is fundamentally unsound to invite applications for a new service while rule makings on that service are in progress. UTC asserts that before considering DBS applications, the Commission should conclude a rule making allocating spectrum for the terrestrial microwave users that will have to vacate the DBS frequencies. The Licensees suggest that the Commission should resolve the question of use of the spectrum for terrestrial HDTV before entertaining any DBS applications.

21. The Commission has broad discretion to order its processes, so long as those processes are fundamentally fair and do not violate statutory requirements. In this instance, given the extended lead time necessary to effectuate a satellite service, the Commission determined that applications would be accepted before the conclusion of the DBS rule making. Far from being an unsound procedure, the acceptance of specific DBS proposals permitted the sharp focusing of policy issues and options. Thus,

the procedure actually helped the Commission appropriately conclude the July 21 *Report and Order.* Moreover, vehicles to study the availability of alternative spectrum for terrestrial microwave users have been put in motion, and the present DBS rules will accommodate HDTV. We do not believe that any concept of fairness requires us to finally resolve these issues before taking the first step in authorizing a DBS service for the American public. On the contrary, we believe that the considerable delays that would result from awaiting the conclusion of other rule makings would operate to the detriment of the public and its ability to receive this new service. In this regard, we note that the action taken here will not require the move of terrestrial microwave users. The Commission has addressed Fixed Sevice (FS) user status in the DBS *Report and Order,* 90 F.C.C. 2d 676, 699–706, and is proceeding to further consider and resolve matters of FS user relocation as detailed therein. This action does not resolve any issues regarding DBS HDTV. We are only granting authority to take an initial step toward DBS service, but that first step will begin the multiyear process of actually constructing and launching a satellite. To delay that first step, pending other inquiries whose resolution is not absolutely required at this early stage, would disserve the American public.

22. The Licensees and the Affiliates argue that the shortness of the cut-off period for accepting applications in conjunction with STC's is itself a procedural defect. We believe that this contention is adequately answered by the fact that seven other parties submitted applications which were both timely and acceptable for filing in their entirety. Furthermore, we note that our consideration of the first round of applications at this time[16] in no way forecloses others from filing applications and receiving protection in later cut-off cycles.

23. MST asserts that the deadline for petitions to deny should have been set after the conclusion of the rule making so that petitioners would have been able to focus on those issues which were relevant under the policies and rules adopted by the Commission. The deadline for petitions to deny the STC and other DBS applications was subsequent to the issuance of the Commission's *Notice and Policy Statement* in the DBS matter. That *Notice* contained substantial discussion of the policy issues faced by the Commission and the Commission's present thinking on the requirements for a successful DBS application. While the guidance thus provided did not provide the final Commission opinion on the matter, petitioners were not left without any assistance in formulating their submissions. The absence of final rules and policies at the time the petitions were filed did not deprive the parties of their ability to raise issues after the DBS *Report and Order.* In this regard, we note that no

[16] See also *Report and Order,* at paragraph 78.

petitioners found it necessary to amend their petitions subsequent to the adoption of the *Report and Order* and prior to our action here. Further, any matters that were not identified as a Commission concern in the *Notice and Policy Statement* but became significant upon adoption of the *Report and Order* can be raised when DBS applicants apply for launch and operational authority. Thus, the procedure by which we have attempted to expedite consideration of DBS applications to set the lengthy construction and launch process in motion has not deprived petitioners or other parties of any procedural rights. On the contrary, parties have been given ample opportunity to participate under procedures which preserve the fundamental interests of petitioners, applicants and the public alike.

## *V. Comsat's Authority to Engage in DBS Services*

### *A. Comsat is not barred from entering into the DBS field as a matter of law.*

24. At the outset we must consider whether Comsat has the legal authority to engage in DBS services through its separate subsidiary, STC. Petitioners argue that Comsat may not enter into the DBS venture because the Communications Satellite Act of 1962 (Satellite Act) and its legislative history clearly show that Congress intended to limit Comsat and any of its subsidiaries to common carrier activities. They contend that Comsat's functions are defined exclusively in Section 305 of the Satellite Act. Section 305 authorizes Comsat to, among other things, own and operate a commercial communications satellite system; provide channels to communications common carriers and other authorized entities; and, to own and operate satellite terminal stations licensed by the Commission. According to petitioners, the authorizations in Section 305 are to be read as prohibiting Comsat from engaging in activities apart from its common carrier role in providing satellite services. The petitioners further state that Congress made its intent to limit Comsat clear in section 401 of the Satellite Act. Section 401 declares that "[t]he corporation [Comsat] shall be deemed to be a common carrier within the meaning of Section 3(b) of the Communications Act . . . and as such be fully subject to the provisions of Title II and Title III of that Act."[17] In view of this alleged limitation of Comsat to common carrier activities, it is further asserted that Comsat is prohibited from providing financial guarantees for non-common carrier ventures. For example, ABC argues that section 201(c)(8) of the Satellite Act limits Comsat to assuming obligations or debts only if such assumptions are "necessary or appropriate for" or

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[17] 47 U.S.C. § 741. ABC also points out that various subsections of Section 201 of the Satellite Act are similar to the common carrier provisions of Section 202 of the Communications Act. The 201 subsections cited set out rate setting, accounting and service requirements. 47 U.S.C. § 721(c), (2), (5), (10)

"consistent with" Comsat's INTELSAT/INMARSAT obligations. ABC further argues that non-common carrier ventures are neither "necessary or appropriate for" or "consistent with" the Satellite Act and, therefore, are prohibited by the Act.

25. To support their statutory interpretation, petitioners provide several statements of record by various legislators assuring or explaining to others during consideration of the Satellite Act that the corporation being established would be empowered to act as a common carrier only.[18] They contend that these statements were made in reference to Comsat's corporate powers, and not just its specific INTELSAT role.

26. Petitioners' arguments here are basically reiterations of arguments that have already been unsuccessfully advanced to this Commission and are in any event unpersuasive. This is the third time this year that we have had to resolve challenges to Comsat's authority under the Satellite Act to engage in non-INTELSAT/INMARSAT activities. In *Ship Earth Stations*, 90 FCC 2d 488, FCC 82–219, released May 18, 1982, we determined that Comsat is not legally barred from manufacturing and marketing shipboard terminals, a non-common carrier activity. In our recent *Comsat Structure* decision, we turned back broader challenges to Comsat's scope of authority under the Satellite Act.[19] There we rejected arguments that Comsat may only engage in activities that are in direct furtherance of the Satellite Act and that such activities are limited to common carrier services. In so doing, we found that none of the parties posing these arguments offered any new information or presented any arguments that we did not consider in our 1980 *Comsat Study* analysis of Comsat's scope of authority. *Comsat Structure*, FCC 82–634 82 FCC 2d 397, at 14–15. We incorporated our *Comsat Study* analysis by reference in the *Comsat Structure* order and reaffirmed our conclusion that Comsat is permitted under the 1962 Satellite Act to engage in activities that are not inconsistent with its INTELSAT/INMARSAT mission. We stated that:

> The 1962 Satellite Act and Comsat's Articles of Incorporation make it clear that Comsat must engage in activities that are necessary to the establishment of the global system contemplated by Section 102 of the Act. By the same token, Comsat may not engage in activities that are inconsistent with the Act's purposes and objectives. With respect to other activities, the 1962 Act and the Articles of Incorporation are neutral. We therefore conclude that there is no legal bar, either in the 1962 Act or in the Articles, to Comsat's involvement in non-INTELSAT/INMARSAT activities so long as such activities are not inconsistent with and do not hinder or interfere with the Act's purposes and objectives. This view reflects the broad interpretation that properly should be given to the 1962 Act. *Comsat Structure, supra* at 14–15.

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[18] See ABC petition to deny at 15–17 and NAB petition to deny at 36–37 citing H.R. Rep. No. 1663, 87th Cong., 2d Sess.; 108 Cong. Rec. 16869.

[19] *Communications Satellite Corporation*, FCC 82–634, released August 13, 1982 [hereinafter cited as *Comsat Structure*], 82 FCC 2d 397.

We further stated that this view is consistent with past Commission actions authorizing Comsat to engage in non-INTELSAT/INMARSAT activities,[20] including our decision in *Satellite Business System* where we authorized Comsat to provide domestic satellite services unrelated to its statutory obligations.[21] Our authorization for SBS was affirmed by the District of Columbia Court of Appeals.[22]

27. We have also authorized Comsat to lease Comstar facilities through a separate subsidiary on a bulk line leasing basis.[23] In so doing, we did not require the Section 214 certification required of common carriers. We held that Comsat's provision of facilities and services pursuant to a lease agreement with AT&T would be treated as a non-common carrier activity not requiring a tariff filing. In addition to its SBS and Comstar services, Comsat is involved in a variety of non-INTELSAT/INMARSAT activities. Many of these ventures are non-common carrier activities including manufacturing telecommunications equipment, providing satellite system consultative services, and developing computer technologies.[24] We found in our *Comsat Structure* decision that as long as appropriate safeguards are present the Satellite Act does not bar Comsat from engaging in these activities.

28. As in our *Comsat Structure* proceeding, the petitioners here basically rely upon arguments already considered and rejected. We again disagree with petitioners that the Satellite Act and its legislative history limit Comsat solely to common carrier activities. As we stated in the *Comsat Study,* Sections 305 and 401 place no limitation on Comsat's permissible activities pursuant to Section 102. The powers granted in Section 305 are intended simply to confer on Comsat the necessary authority to carry out the Act's purposes and objectives. The provision does not bar Comsat from engaging in other activities so long as such other activities do not interfere with its INTELSAT/INMARSAT obligations. Nor does Section 401 limit Comsat in any way. The fact that Comsat is deemed to be a common carrier does not, without more, preclude it from engaging in non-common carrier activities. Indeed, it is not unusual

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[20] See *Domestic Communications—Satellite Facilities,* 22 F.C.C. 2d 86 (1970); *Domestic Communications—Satellite Facilities,* 35 F.C.C. 2d 844 (1972); *Satellite Business Systems,* 62 F.C.C. 2d 997 (1977), *aff'd en banc sub nom. United States* v. *FCC,* 652 F.2d 72 (D.C. Cir. 1980); *see also In the Matter of Magnavox Government and Electronics Company,* FCC 79-463 (July 31, 1979).

[21] *Satellite Business Systems,* 62 F.C.C. 2d 997 (1977), *aff'd en banc sub nom. United States* v. *FCC,* 652 F.2d 72 (D.C. Cir. 1980).

[22] *United States* v. *FCC,* 652 F.2d 72 (D.C. Cir. 1980) The decision does not indicate that any question was raised with regard to Comsat's authority to enter into SBS, which is an activity unrelated to Comsat's INTELSAT/INMARSAT obligations.

[23] *Establishment of Domestic Communications Satellite Facilities by Nongovernmental Entities,* 38 F.C.C. 2d 665 (1972).

[24] For a detailed description of Comsat's activities, see *Comsat Structure,* FCC 80-634 at 5-7, 82 FCC 2d 397.

for communications and other common carriers to engage in non-common carrier activities.[25]

29. As we also stated in previous orders, there is nothing in the legislative history of the Satellite Act that convincingly demonstrates that Congress intended to preclude Comsat from entering into non-common carrier activities.[26] We have found that the legislative history surrounding the passage of the Satellite Act is "not definitive" as to whether the authority granted to Comsat extends to non-INTELSAT activities.[27] The legislative discussions cited by petitioners as allegedly limiting Comsat solely to a common carrier role are discussions of Comsat's responsibilities in creating the global system envisaged by the Satellite Act and are not intended as a limitation on general corporate power. Moreover, contrary to petitioners' contentions, Section 201(c)(8) of the Satellite Act does not limit Comsat to borrowing money for INTELSAT activities only. Comsat is permitted to guarantee loans for competitive ventures. Under Section 201(c)(8), Comsat must seek prior Commission approval before it can issue stock, borrow money, or assume the obligation with respect to the securities of another. The Commission will authorize any such transaction upon a finding that it is in the public interest and is "necessary and appropriate for" or "consistent with" the purposes and objectives of the Act. We have determined that this standard is sufficiently broad to enable Comsat to guarantee the loans of its subsidiaries so long as such loans are in the public interest and do not hinder or interfere with Comsat's INTELSAT/INMARSAT duties. For all these reasons, we conclude, as we have before in our *Comsat Study* and *Comsat Structure* decision, that Comsat is not barred from entering the DBS field as a matter of law and that the Satellite Act does not limit Comsat to common carrier activities.

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[25] There is no merit to ABC's related argument that Comsat's Articles of Incorporation limit it "to the purposes and objectives of the 1962 Act." Section 305(c) merely provides that to carry out the Act's purposes "the corporation shall have the usual powers conferred upon a stock corporation by the District of Columbia Business Corporation Act." There is nothing in this language which in any way limits Comsat's activities or restricts its Articles of Incorporation so as to prohibit it from engaging in non-INTELSAT/INMARSAT activities. On the contrary, as STC points out, "Comsat possesses broad powers under the modern corporate law to engage in all activities incidental or consequential to its corporate purposes which are not expressly prohibited by its charter, applicable law or public policy." (See STC Opposition to Petitions to Deny, at 9 n. 17).

[26] *Implementation of INMARSAT*, 74 F.C.C. 2d 59, 109 (1979) [hereafter cited as *Interim Report*]; *Comsat Study*, 77 F.C.C. 2d at 611 n. 52, 612 n. 57.

[27] Petitioners have also misconstrued the International Maritime Satellite Telecommunications Act and its legislative history. That legislation committed the United States as a matter of policy to participation in INMARSAT. In doing so, the legislation designated Comsat to be the United States representative to INMARSAT. Contrary to petitioners' interpretation, the Maritime Act was not intended as a statement of limitation regarding Comsat's non-INTELSAT/INMARSAT activities. *Id.*

*B. The public interest will be served by permitting Comsat to enter into the STC venture.*

30. Having determined that there is no legal bar, we next consider the question as to whether Comsat should be permitted as a matter of sound policy to proceed with its plans to finance STC and whether such plans are in the public interest. We are guided by the *Comsat Structure* decision and the public interest standards in Section 309 of the Communications Act and Section 201(c)(8) of the Satellite Act.[28] The *Comsat Structure* decision stated that as a matter of policy Comsat may enter into non-INTELSAT/INMARSAT ventures so long as the Commission's concerns with regard to misallocation of costs, anticompetitive behavior, and other improper conduct are remedied. The public interest standards require the Commission to weigh all factors in determining whether the public interest is served by permitting Comsat to enter into the STC venture. Under these guidelines, we must consider here whether the potential benefits to the public which may be derived from Comsat's STC venture outweigh the possible detriments, particularly the possible risks to Comsat's obligations as a monopoly carrier under the Satellite Act. Petitioners opposing STC's DBS application have set forth a number of arguments as to why it should be disapproved.

31. First, petitioners argue that impermissible cross subsidization between Comsat's INTELSAT/INMARSAT operations and STC will inevitably occur. They assert that cross subsidization through misallocation of costs is intrinsic in the structure of the Comsat corporation and that this problem cannot be prevented through the use of structural separation or by Commission oversight. Second, petitioners argue that STC would have an unfair competitive advantage in the DBS field. They contend that, unlike its competitors, STC is being funded in part by money derived from Comsat's monopoly operations and that the use of monopoly revenues precludes evenhanded competition.[29] Petitioners also find unfair advantage in STC's exclusive access to the satellite technological and marketing information that Comsat has as a result of its unique INTELSAT/INMARSAT role. Third, petitioners argue that the DBS venture will have substantial impact on Comsat's cost of capital. Investors will preceive that STC's risk is Comsat's risk. As a result, Comsat's access to capital markets will be impaired and its cost of capital increased. Petitioners further assert that these costs will ultimately be borne by

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[28] The public interest analysis was applied in *Ship Earth Stations*, FCC 82–219, 9–10, 90 FCC 2d 488.

[29] Petitioners cite the *Comsat Study* where the Commission stated that these competitive advantages may be inconsistent with the Satellite Act's provision that "maximum competition will be maintained in the provision of equipment and services utilized by the system." *Comsat Study*, 77 F.C.C. 2d at 570–71, 648.

Comsat's international customers. Finally, petitioners argue that the STC venture threatens Comsat's basic financial integrity. They argue that the STC venture cannot be financed as proposed without severely affecting Comsat's INTELSAT/INMARSAT duties. They state that Comsat does not have enough of a cash flow to transfer $225 million to STC, meet its INTELSAT/INMARSAT financial obligations, finance other investments, and pay dividends. They argue that the proposed guarantee of STC's loan also jeopardizes Comsat's INTELSAT/INMARSAT operations by increasing substantially the corporation's financial exposure. Therefore, they contend that pursuant to Section 201(c)(8), the Commission should prohibit the guarantee because it cannot be found to be in the public interest.

32. To a large extent, the concerns raised by petitioners are not specific to STC's application but, rather, relate generally to all non-INTELSAT/INMARSAT activities that Comsat might undertake. The general concerns raised by petitioners have been addressed before in our *Comsat Study* and *Comsat Structure* decision. In the *Comsat Study*, we determined that the public interest would be served if Comsat is permitted to apply its technological expertise to competitive ventures. In that proceeding, we considered the same concerns that petitioners raise here regarding Comsat and its monopoly position. One concern was that Comsat might pass on costs associated with its competitive ventures to international ratepayers. Another concern was that Comsat, in order to gain advantages in competitive markets, might maintain exclusive control over INTELSAT/INMARSAT information relating to satellite technology development, market opportunities and market capabilities of potential foreign and domestic competitors. We recognized that these practices could adversely affect Comsat's international ratepayers, place in jeopardy Comsat's ability to fulfill its financial obligations to INTELSAT and INMARSAT, and provide Comsat with unfair competitive advantages.

33. We determined that structural separation of Comsat's monopoly and competitive ventures would reduce Comsat's ability to misallocate costs or engage in anticompetitive behavior and would enhance our ability to monitor intracorporate transactions. In response to our findings in the *Comsat Study*, Comsat reorganized its activities to structurally separate its monopoly and competitive ventures. We assessed the adequacy of Comsat's changes in the recent *Comsat Structure* decision and found that although Comsat's voluntary structural changes were consistent with the *Comsat Study*, they did not fully resolve the concerns we raised. Therefore, additional changes were ordered. We imposed accounting and reporting requirements with regard to research, development and administrative costs in order to prevent Comsat and its subsidiaries from engaging in cross subsidization through misallocation of costs. We also

required Comsat to take steps to provide greater public dissemination of INTELSAT/INMARSAT information available to its affiliates if such information was not otherwise available to the general public and ordered Comsat to maintain a non-discriminating licensing policy for ratepayer funded inventions and data. These requirements are intended to enable competitors to get timely and relevant information that was previously unavailable. Comsat was given 90 days from the release date of the *Comsat Structure* decision to provide the Commission with plans correcting the structural, accounting and reporting deficiencies cited. The Chief, Common Carrier Bureau, will review the various Comsat proposals. Within nine months of the release date, the Chief will report back to the Commission with an assessment of Comsat's proposals and, if required, recommendations regarding further structural separation. Whatever additional requirements are adopted will apply to Comsat and all its affiliates.

34. With regard to Comsat financing its separate subsidiaries, we have determined that as a matter of policy Comsat may invest its profits in its subsidiaries so long as such investment does not adversely affect Comsat's ratepayers and INTELSAT/INMARSAT activities and is otherwise consistent with the public interest. In our *Comsat Structure* decision, we rejected requests by ABC that limitations be placed on Comsat's overall financial support of competitive ventures. We specifically rejected across-the-board limitations on future investments. Instead, we decided to oversee Comsat's financial support of competitive ventures through case by case review of individual investments.[30] Additionally, in *Comsat Structure,* we adopted safeguards to cover any instances in which Section 201(c)(8) of the Satellite Act may not be applicable.[31] Comsat is required to provide the Commission with at least 90 days advance notice of any expenditures related to a competitive venture that would necessitate or result in Comsat having to seek additional debt or equity financing for other corporate activities. The Commission's staff will then have an opportunity to assess the impact on both the ratepayer and on Comsat's ability to meet its INTELSAT/INMARSAT financial obligations. If the Commission, or the Common Carrier Bureau pursuant to delegated authority, takes no action within this period, Comsat may proceed with its plans without prior Commission authorization. We reserved the right, however, to approve such expenditures depending upon the complexity of the issue at hand. Such approval is not limited to the 90 day period. We stated that this requirement will give us sufficient opportunity to assess

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[30] *Comsat Structure*, FCC 80–634, at 44–45, 82 FCC 2d 397.

[31] Section 201(c)(8) of the Satellite Act requires Commission authorization before Comsat can issue shares of capital stock, borrow money, or assume any obligation with respect to the securities of any other person. This section does not by its terms specifically require Commission authority before Comsat could transfer its own capital to a non-INTELSAT/INMARSAT subsidiary.

the impact of parent company support of affiliates and enable us to protect monopoly ratepayers and to ensure Comsat's ability to meet its INTELSAT/INMARSAT financial obligations. *Comsat Structure, supra*, at 44–45.

35. We believe that structural conditions, coupled with the additional requirements imposed in the *Comsat Structure* decision, will enable us effectively to monitor Comsat for potential abuse. Furthermore, as we stated in the *Comsat Structure* decision, we will consider additional structural separation if the requirements that we imposed on Comsat prove unsuccessful. Thus, we reaffirm the view enunciated both in our *Comsat Study* and in our *Comsat Structure* decisions that Comsat need not, as a general policy matter, be prohibited from pursuing activities outside its INTELSAT/INMARSAT role. Rather, we will assess the public interest considerations inherent in any such venture on a case by case basis.

36. We come then to the specific issues raised by STC's application. In applying the public interest standard under the Communications Act, we must compare the specific benefits and detriments of the STC venture in order to make the public interest determination. We can conclude that Comsat's entrance into DBS is in the public interest only if we find that the benefits outweigh the detriments. Additionally, we must consider further conditions and requirements so that possible detriments can be minimized. The potential benefits to the American public of the STC venture are significant. STC's proposed DBS service will provide the public with additional channels, programming variety, technically innovative services, expanded non-entertainment services, and improved service to remote areas. *Report and Order*, FCC 82–285, 81 FCC 2d 277 5–7, released July 14, 1982. Economic benefits include creating employment opportunities in high technology and programming sectors of the economy and spurring competition in the home video market. In addition, STC's DBS service will promote national goals of advancing the art of satellite communication and maintaining American leadership in the civilian space field.

37. As we stated in the DBS *Report and Order*, DBS furthers the statutory goal of providing equitable distribution of service throughout the nation. 47 U.S.C. § 307(b). DBS is a new technology capable of providing service to all areas of the country. As a result, remote areas that now have little if any television service will be able to receive expanded television service.[32] In addition, the quality of the expanded television service will be the same as in urban areas because the signal strength is

[32] The costs of providing DBS to a rural subscriber are about the same as providing service to an urban subscriber. Therefore, the provision of the service does not depend on concentration of population in order to supply video service on a cost-effective basis.

the same regardless of the geographic location in the region served by a DBS satellite. Furthermore, some areas that are adequately served by conventional broadcasting still do not receive video alternatives such as cable or subscription television. DBS will offer many areas their first opportunity to receive a pay-television service. DBS will help meet increasing consumer demand for more home video services. As we have found previously, there is a large unmet demand for additional home video services in urban markets as well as rural areas.[33] The courts and the Commission repeatedly have recognized the importance of increasing the number of media outlets by encouraging the development of new modes of video delivery.[34] In addition, as we stated in the DBS *Report and Order*, the United States' position at RARC–83 will be significantly enhanced if we can show actual requirements based on experience instead of speculative needs based on assumptions.

38. STC's DBS proposal will provide these benefits to the American public. STC will offer three new channels of video programming to all areas in the eastern time zone. Through its planned "counter programming" strategy, STC states that it will offer customers more diverse programs on each of its three channels. Additionally, by providing DBS on a subscription basis, STC will be better able to isolate the needs of its audience and, therefore, be better able to serve discrete audience groups. STC also plans to offer more public service, minority, and children's programming, as well as such innovative services as stereophonic sound, closed captioning for the hearing impaired, a second language soundtrack and teletext.[35]

39. The economic benefits cited will be furthered by STC's entrance into the DBS field. STC will be a new voice in the home video market. Its programming and technological innovations will make it a significant competitor. Additionally, STC will provide new employment. According to United States Department of Labor estimates, STC will support between approximately 15,000 and 23,000 jobs directly or indirectly.[36]

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[33] *Report and Order*, FCC 82–285, 81 FCC 2d 277 at 6. See *Notice of Proposed Rule Making on VHF Drop-In Service*, 83 F.C.C. 2d at 56.

[34] *See, e.e., United States* v. *Midwest Video Corp.*, 406 U.S. 649, 667–68 (1972) (plurality opinion); *First Report and Order*, 46 Fed. Reg. 27953, 27955 (1981) (business radio service); *Notice of Proposed Rule Making on VHF Drop-in Service*, 83 F.C.C. 2d 51; *Notice of Proposed Rule Making*, 45 Fed. Reg. 69178 (1980) (low-power TV proceeding); *First Report and Order*, 20 F.C.C. 2d 201, 202 (1969) (cable television service). Experimentation with new delivery systems is a valued means of promoting competition and diversity, even where proposed services do not differ markedly from services provided by existing sources. *Second Report and Order on Comsat*, 35 F.C.C. 2d at 846.

[35] The flexible regulatory and spectrum allocation provisions in the *Report and Order* will make the introduction of these new services relatively easy. *Report and Order*, FCC 82–285 at 7, 81 FCC 2d 277.

[36] STC Application, Volume 1, at 15–17. These estimates are based on expected levels of expenditure for STC from 1982 through 1992 and include projections for primary and secondary support industries.

40. Comsat's telecommunications satellite expertise will enable STC to implement DBS expeditiously, thereby enhancing the United States' competitive edge in world wide telecommunications satellite markets. Furthermore, the information generated by STC will better enable the United States' delegation to RARC–83 to present cogent and realistic arguments for the full accommodation of United States DBS requirements.

41. In our view, the benefits of Comsat entering into the DBS field outweigh the problems raised by its proposal. We believe that the structural conditions and other requirements that we imposed will guard against improper misallocation of costs and other anticompetitive behavior. We are confident that the structural, accounting, and reporting modifications Comsat has undergone since the *Comsat Study* and the additional requirements imposed in the *Comsat Structure* decision will serve to alleviate the cross subsidization concerns raised by petitioners.[37] Comsat has created STC as a separate corporate subsidiary. STC has separate officers, employees, facilities, and books of account. These modifications must be supplemented by the *Comsat Structure* requirements. The *Comsat Structure* decision requires Comsat to improve accounting for research and development costs done by Comsat Labs and to establish appropriate control mechanisms to restrict Comsat Labs' use of nonpublic INTELSAT/INMARSAT information to support STC and other competitive ventures. Comsat must also correct deficiencies in how it accounts for costs of administration and support services shared between the parent organization and other affiliated entities such as STC. These modifications will better enable us to monitor Comsat and STC for any possible misallocation of costs. Additionally, in accordance with the *Comsat Structure* decision, STC is subject to all corporate modifications that the Commission may adopt later.

42. We disagree with petitioners that STC will have an unfair competitive advantage because STC will be able to use monopoly generated revenues and technical information that is not available to competitors. As already noted, so long as Comsat's INTELSAT/INMARSAT obligations are not impaired, Comsat investors are free to manage their profits as they wish. Comsat has decided that STC is a worthy venture and a sound investment. The Commission will not interfere with this investment decision so long as Comsat's ratepayers and INTELSAT/INMAR-

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[37] Contrary to NAB's and other petitioners' request, we see no need to set this application for a Section 403 hearing or a hearing on other grounds to determine whether cross subsidization will occur. "Only where the public interest cannot be determined without a resolution of disputed facts has Congress dictated that the Commission must conduct a hearing." *Marsh* v. *FCC*, 436 F. 2d 132, 136 (D.C. Cir. 1970), *quoted in*, *Communications Satellite Corporation, (Hickam/Finegayan Facilities)*, 80 F.C.C. 2d 170, 184 n. 40 (1980). As shown above, we are able to make the necessary public interest finding for this application.

SAT obligations are not adversely affected. With regard to technical, marketing, and other information, the requirements mandated in the *Comsat Structure* decision will assure that any information received by STC from Comsat will be made available to the public under the same terms and conditions.

43. We disagree with petitioners that Comsat's financial support of STC will result in an increase in Comsat's cost of capital which, in turn, will ultimately affect Comsat's INTELSAT/INMARSAT responsibilities.[38] The possibility exists that Comsat's cost of capital may rise.[39] The issue, however, is not whether the firm's overall cost of capital will rise but whether the increase will be passed on to Comsat's INTELSAT/INMARSAT side. We will take the cost of capital factor into account in future tariff filings or rate cases and we will base Comsat's allowable rate of return for INTELSAT/INMARSAT activities solely on the cost of capital for those activities.

44. Additionally, petitioners' allegation that it is impossible to separate the cost of capital for INTELSAT/INMARSAT and non-INTELSAT/INMARSAT activities is incorrect. While there are certainly difficulties, the need to separate INTELSAT/INMARSAT and non-INTELSAT/INMARSAT capital costs exists for most communications common carriers subject to this oversight. We have undertaken such separation in the "bellwether" rate case[40] and we are doing it presently in the *ITT World Communications* rate case.[41] In the future, it will also be necessary to separate rate regulated and non-rate regulated capital costs for all Bell

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[38] We limit our discussion to the effect the STC venture will have on Comsat's INTELSAT/INMARSAT obligations. Substantial effort is expended in taking issue with the funding for STC. There are claims that future earnings will not be sufficient to fund Comsat's $225 million equity investment and that borrowing will be necessary; that STC may not receive its $400 million line of credit from a banking syndicate; that STC's first year earnings may not be as high as projected; and that STC interest costs on debt have been greatly understated. These are controversial, speculative issues whose resolution depend upon which assumptions about the future one chooses to accept. The success or failure of STC will be determined by marketplace factors. The Commission's concern is not with whether STC's specific financing projections are accurate but rather with insuring that Comsat's INTELSAT/INMARSAT obligations are met and ratepayers are not disadvantaged. As stated above, we believe that this concern is satisfied by the structural, accounting, and reporting requirements that have been imposed and by the Commission's oversight of future tariff filings and rate cases.

[39] Comsat's assuming more debt, however, may have the effect of lowering rather than raising the firm's cost of capital. A company's overall cost of capital consists of the weighted average of the cost of equity financing (stock issuances and the use of retained earnings) and debt financing (loans). The measured cost of debt is typically less than the cost of equity due to the tax advantages of interest write offs. Thus, the use of debt financing will normally lower the firms cost of capital. This occurs up to a certain level after which a firm may be considered too highly leveraged to obtain debt financing at reasonable rates.

[40] *The Western Union Telegraph Co.*, 25 F.C.C. 2d 535 (1958).

[41] *ITT World Communications, Inc.*, 88 F.C.C. 2d 201 (1981), *modifying, ITT World Communications, Inc.*, 82 F.C.C. 2d 282 (1980).

System companies that provide CPE or enhanced service outside of regulation.

45. We also reject petitioners' assertions that Comsat's financial support of STC will adversely affect the financial integrity of Comsat. Comsat will have sufficient funds through 1986 to provide STC with a $225 million equity contribution and to meet its INTELSAT/INMARSAT obligations. Comsat estimates that it will generate a positive cash flow of $550 million during the 1981–86 period. Based on Comsat's operating results over the past five years, we find that the cash floor estimate for the 1981–1986 period to be reasonable. From this amount, Comsat can meet its expected $300 million financial obligation to the INTELSAT and the INMARSAT systems, pay projected dividends of $100 million[42] and have $150 million for investment in STC. The remaining $75 million STC contribution and any unexpected statutory obligation can be funded by Comsat's additional financing sources. Given Comsat's virtually debt free capital structure, it can safely borrow up to $200 million.[43] An additional $100 million could be obtained from the reissuance of treasury stock.[44] Out of this $300 million plus amount, Comsat can provide the additional $75 million to STC and still have a "cushion" of over $225 million for any unexpected financial needs of its INTELSAT/INMARSAT operations or other investments. Furthermore, an indeterminate amount of funding is available if Comsat elects to issue additional shares of stock.

46. We also deny petitioner's request that we disallow Comsat's $170–200 million guarantee of STC's $400 million line of credit. Section 201(c)(8) permits the Commission to authorize Comsat to assume an obligation as long as the obligation is not inconsistent with Comsat's INTELSAT/INMARSAT duties and is in the public interest. The guarantee is limited to the tax savings Comsat will accrue on a consolidated tax return due to investment tax credits and the initial losses that STC will experience. These tax savings are directly attributable to the tax advantages of the STC investment. As a result, the guarantee will not increase Comsat's projected net cash obligation, or exposure, during the period of 1982–1986 beyond the initial $225 million capital contribution. Therefore,

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[42] Comsat paid dividends of approximately $18 million in 1981. The $100 million dividend payout is based on our assumption of an average $20 million dividend per annum for the next five years.

[43] Based on its existing equity of $500 million, $200 million in debt financing would give Comsat a safe 30% debt to total capitalization ratio. In January 1982, we approved Comsat's request to borrow $30 million of the $200 million. 88 F.C. 2d 931 (1982). More recently, we authorized Comsat to borrow $70 million more. *Comsat Request to Acquire Debt Financing*, FCC 82–419, released September 24, 1982. We conditioned both grants of authority to borrow upon the requirement that "Comsat allocate its cost of debt in a manner that will ensure that the ratepayer assumes liability only for that portion of the debt to be used for jurisdictional (INTELSAT/INMARSAT related) activities." All further borrowing authorizations will be similarly conditioned.

[44] Based on current market prices.

the guarantee will not affect Comsat's INTELSAT/INMARSAT responsibilities.

47. Although we find that Comsat's entrance into the DBS venture is in the public interest and are confident that the Commission can ensure against adverse impact to Comsat's INTELSAT/INMARSAT requirements, it is important to note that the STC investment is unique in several respects. The magnitude of Comsat's investment in STC is substantial[45] and there are significant uncertainties involved in estimating the future viability of the DBS operation. Therefore, based on these unique aspects of the venture, the Commission will seek an added measure of future safety for Comsat's INTELSAT/INMARSAT side by placing the following condition on its approval of the DBS venture: STC must first use all reasonable means to secure capital from external financial markets before approaching the Commission for permission to obtain additional parent financing.

48. This condition will enable the Commission to assess Comsat's ability to place the primary risk of the venture on the competitive subsidiary and monitor developments on an *ad hoc* basis. It should also be noted that Comsat is required to request Commission approval if it seeks to provide an equity contribution to STC exceeding the currently authorized $225 million.[46] Furthermore, pursuant to 201(c)(8), Commission approval is required for any Comsat guarantees of additional STC loans.[47]

49. We conclude that the public interest will be served by Comsat entering into the STC venture. We believe that the structural, accounting, and other requirements imposed on Comsat in the *Comsat Study* and *Comsat Structure* decision and the conditions we attach to this grant will enable us to effectively monitor intracorporate transactions between Comsat and STC. This oversight will enhance our ability to ensure that the STC venture does not adversely affect ratepayers or Comsat's INTELSAT/INMARSAT responsibilities. We also reserve the right to require further corporate modifications, including complete divestiture, if, at any time, we find that the STC venture threatens to or has, in fact, adversely affected ratepayers or Comsat's pursuit of its INTELSAT/INMARSAT mission.

## *VI. General Issues Related to DBS and the STC Application*

### *A. Competitive Impact on Existing Terrestrial TV Services*

50. *Allegations*—In their petitions to deny, MST and NAB allege that a significant question is raised as to whether a grant of STC's application

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[45] Comsat's proposed equity in STC will be in the range of 30 to 35 percent of the combined equity of Comsat and STC.

[46] *Comsat Structure*, FCC 82-372 at 45.

[47] 47 U.S.C. § 721(c)(8).

would result in "less service" or less desirable service to the public, rather than increased and improved service. They contend that this question constitutes a *Carroll* issue requiring a hearing to determine whether the application can be granted.[48] MST finds such an issue particularly appropriate here because there are alternative uses for the spectrum which could benefit the public by fostering more innovative technologies and/or promoting competition in existing markets that are less competitive.

51. Further, MST and NAB cite several reasons not to dedicate this spectrum to DBS. It is alleged that DBS would affect the financial viability of STV stations that provide local and special services for free. NAB argues that the "convincing showing" of adverse impact found lacking in the *Notice and Policy Statement* is made in STC's application. It refers to a study by Arthur D. Little ("Little Study") projecting STC's impact on present and future STV stations. According to NAB, that Study projected a loss for STV stations with five percent market penetration of forty to eighty percent of their subscribers. NAB argues that this threat to the viability of STV stations presents an issue sufficient to require a hearing under *Central Alabama Broadcasters, Inc.*, 68 F.C.C. 2d 1339 (1978). NAB finds this point particularly significant because the Commission has found that in some circumstances the only way to provide service is via an STV station.[49] After contending that the ability of STV stations to provide local television service would be "decimated" by STC, it lists twelve such stations (two of them minority owned) and summarizes the locally-oriented programming they present. NAB claims that these stations rely on their subscriber revenue to sustain their current levels of local programming.

52. According to NAB and MST, DBS service would also impact all other television stations and reduce local service to minorities, rural areas, and special audiences by siphoning programming, fragmenting audiences, and possibly reducing advertising support.[50] MST contends that DBS service will also compound the impact of other existing competitive technologies on local stations, such as MDS and pay cable. In addition, MST contends that the DBS service may forclose local station participation in HDTV, thereby adversely affecting local service. Finally, MST contends that DBS is less in the public interest than the local service

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[48] *Carroll Broadcasting Co.* v. *F.C.C.*, 258 F. 2d 440 (D.C. Cir. 1958). *WLVA, Inc.* v. *F.C.C.*, 459 F. 2d 1286 (D.C. Cir. 1972). The Affiliates also raise this point, although they present no allegations or arguments to support their position.

[49] NAB refers to *Renaissance Broadcasting Corp.*, 75 F.C.C. 2d 441 (1980); and *New Jersey Television Service*, 58 F.C.C. 2d 790 (1976).

[50] MST points out that in the rule making proceeding (General Docket No. 80–603), STC argued that it should not be restricted to pay service.

it could destroy, cripple, or preclude.[51] MST concludes that the cost/benefit analysis of STC's application under the public interest standard required by the Communications Act and the *Carroll* case is particularly important here and requires a full evidentiary hearing. It argues that this cannot be circumvented by reliance on the few inconclusive studies presented to date. It claims that those studies were based on experience with dated, minimal-service cable systems, and were confined to audience impact without considering the impact of audience siphoning. According to MST, the studies also failed to consider the cumulative impact of several DBS systems or advertiser supported DBS.

53. MST and NAB next argue that STC's application raises a question of UHF impact. MST contends that the same issues raised in its *Carroll* allegations are applicable here to existing and future UHF stations. Citing *Central Alabama Broadcasters, Inc., supra,* both petitioners assert that under this policy, the proponent of a new service must demonstrate sufficient public interest benefits from its proposal to outweigh any threatened loss of existing or near-term UHF service. MST contends that this policy is applied more strictly when a new class of service is proposed.[52] Although the Commission has been narrowing its special protection for UHF stations in recent years, NAB asserts that the Commission must continue to focus on local programming and the special vulnerability of UHF stations insofar as such programming is concerned. NAB contends that the Commission should be especially concerned when the UHF station threatened is the only station in a community. It then identifies six UHF stations in STC's proposed service area that provide the only Grade A signal to their respective markets. NAB lists several additional areas where service is provided solely by UHF stations. It maintains that Commission policy would preclude the introduction without a hearing of one, much less three new VHF stations in these markets, and that if the Commission wishes to abandon its UHF impact policy, it cannot do so without providing a rational explanation for that change. NAB again refers to the "Little Study" as evidence of the adverse impact which would result from STC's proposed operation.

54. In its opposition pleading, STC contends that the Commission's experience with the introduction of cable service and STV shows that protection is not necessary for existing local broadcasters. It contends

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[51] MST remarks that DBS is a pay service, while STV provides free, local service; that DBS is regional or national, with no community-oriented news, weather, or political coverage; that DBS will have centralized control instead of the local output and diversity of present stations; and that DBS is particularly vulnerable to attack or take-over by foreign nations, insurgents, or others, as well as interruption during heavy rainfall and the spring and fall equinoxes.

[52] MST cites *VHF TV Top 100 Markets*, 63 F.C.C. 2d 840, 860–61 (1977), and *WFMY Television Corp.*, 59 F.C.C. 2d 1010, 1015 (1976).

that DBS will divert only one-third as much audience as cable service has. It claims that there will be no legally cognizable level of harm to established broadcast service, and that this is supported by all of the available studies,[53] two of which were prepared for NAB. It continues that Congress intended such competition (*Policy on Entertainment Formats*, 60 F.C.C. 2d 858 (1976), *aff'd sub nom. F.C.C.* v. *WNCN Listener's Guild*, 450 U.S. 582 (1981)) and that the Court has recognized that a new service cannot be denied authorization merely because it poses a potential competitive threat to existing licensees (*F.C.C.* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 473, 475, 476 (1940)). It argues that the burden is on petitioners to demonstrate a net reduction in service to the public and that the petitioners have offered only unsupported allegations in this regard. STC maintains that petitioners have failed to establish that a reduction in revenues for STV stations will result in a reduction in public service STV programming, or that isolated STV losses will result in a net diminution of service to the public. It argues that UHF stations should no longer be afforded any greater amount of protection than that represented by the *Carroll* case, and that petitioners have recited the benefits of UHF while making only unsubstantiated allegations as to STC's impact on UHF. It contends that NAB has misapplied the Little Study, ignoring qualifications and underlying assumptions expressed in the Study.

55. *Discussion*—We conclude that NAB and MST have raised no arguments which have not already been considered and rejected in the context of overall DBS service in the *Report and Order*. The Commission has already stated, and these parties have recognized in their petitions, that the Commission "is required to consider the economic effect of a new service on existing broadcasters only if there is strong evidence that a significant net reduction in service to the public will result." *Report and Order*, at para. 38. Furthermore, "the Commission cannot reject a new service solely because its entry will reduce the revenues or profits of existing licensees." *Id.* See also: *F.C.C.* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *Carroll Broadcasting Co.* v. *F.C.C.*, *supra*. Neither MST nor NAB nor any of the other petitioners have presented any evidence of a measurable adverse effect on existing broadcasting service which would result in a net loss for the public from the introduction of DBS service as represented by STC's specific proposal.[54] The Commission

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[53] STC refers to Browne, Bortz & Coddington, *Direct Broadcast Satellites: Service, Economic and Market Factors* (Jan. 1981) (prepared for the NAB); Station Representatives Ass'n, Inc., *Satellites and Broadcast Stations: A Guide to Present and Potential Satellite Technology, Uses, Regulation and Economic Impact* (Nov. 1980); Kalba Bowen Assocs. Inc., *Direct Broadcast Satellites: Preliminary Assessment of Prospects and Policy Issues* (Sept. 1980) (sponsored in part by the NAB); Little Study, *supra* (prepared for STC).

[54] While NAB provides a list of specific UHF and STV stations and their programming in the Eastern Time Zone area STC proposes to serve, it presents only conjecture as to what the impact of DBS or STC's service will be on those stations and on the service they provide to the public. The unreliability of the Little Study was discussed in the *Report and Order*, and that study has not been validated by these petitioners. No other reference to quantitative evidence is made by any of the petitioners.

has already recognized in adopting DBS that there may be some revenue losses for STV and MDS operators due to competition from DBS (including STC). However, the extent of the loss is undetermined at this time, as is the extent of the DBS competition that will occur.[55] No evidence has been presented to establish that the loss of isolated STV stations will result in a net loss of service to the public.[56]

56. Thus, the petitioners here have presented no compelling new arguments to modify the determination in the *Report and Order* that the introduction of DBS is likely to have a negligible effect on the audience, revenues, or public interest programming of local broadcasters.[57] As we concluded in that decision: (1) the Commission "should not refuse to authorize a potentially valuable new service solely on the basis of speculative allegations concerning possible reductions in service from other sources"[58] and (2) even if DBS systems were likely to affect the availability of programming from other sources, we believe that their potential benefits are sufficiently great to outweigh some loss of other programming." *Report and Order,* at para. 44. In summary, we conclude that petitioners have failed to raise any substantial and material questions of fact requiring a hearing under Section 309(e) of the Communications Act.

### *B. Additional Competitive Impact Areas*

57. *Allegations*—The Affiliates argued that a grant of STC's application would have an anticompetitive effect on three additional areas of the broadcasting industry: the data transmission industry, the video programming industry, and the DBS industry itself. The Affiliates preface their remarks with the recognition that some measure of conjecture is necessary, but that "there are a more than sufficient number of plausible scenarios, based on educated assumptions as to the eventual magnitude of the many, currently unknown variables, to raise a substantial possibility

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[55] Some petitioners go so far as to argue that the market for DBS is so limited as to require a hearing on the issue of "economic mutual exclusivity." This also rests on the speculation that competition in this area would be so great as to cause a net loss of service to the public. Recognizing that such projections are highly speculative, the Commission has sought to avoid such *a priori* judgments. Instead, it encouraged and received proposals from applicants seeking to offer a variety of service and marketing plans, and adopted rules and policies that would allow DBS operators maximum flexibility to adjust to economic conditions and market experience.

[56] Some parties claim that a loss of STV service, even if compensated by DBS service, is an overall loss for the public as STV is obligated to provide free, locally-oriented programming. However, no showing has been made of the probable extent of the loss of such free, locally-oriented service. Moreover, we note that STV stations are no longer required to provide free, locally-oriented service. *Third Report and Order,* FCC 82–281 (Docket No. 21502, released June 29, 1982), 90 FCC 2d 341.

[57] As far as any impact on the availability of programming is concerned, the Commission has already stated its belief that any such impact is likely to be positive, *Report and Order,* at para. 43, and no evidence has been presented to refute that conclusion. In any case, the petitioners' allegations of negative impact are strictly speculative and do not warrant further consideration.

[58] The Commission relied on *Connecticut Committee Against Pay TV* v. *F.C.C.*, 301 F. 2d 835 (D.C. Cir. 1962); *cert. den.*, 371 U.S. 816 (1962).

that approval of the Comsat application will result in an increase in concentration in the relevant portions of the communications industry."[59] The Affiliates contend that no authorization can be granted until the extent of these risks is made clear.

58. Regarding voice and data transmissions, the Affiliates claim that there have been reports, and that there is every reason to believe, that STC will use a substantial portion of its spectrum allocation for such transmission.[60] Regarding STC's entry into the video programming market, the Affiliates assert that STC will have the opportunity and the incentive to cross-subsidize the costs of its delivery of programming to urban and suburban areas with the income it will receive from its "monopolistic" rural rents.[61] The Commission allegedly will be hampered from imposing such common carrier obligations as non-discriminatory rates by its acceptance of STC as a broadcaster. Finally, STC allegedly will enjoy significant leverage in the pay cable market. The Affiliates claim that STC has already stated that it does not intend to compete directly with entrenched cable systems. However, given the threat of significant direct competition, the Affiliates assert that cable operators will be virtually obliged to carry STC on their systems, and that STC's significantly cheaper receiving antenna and multiple channel operation will give it a substantial advantage over programmers using conventional satellite delivery systems.[62] This will result in twenty-five percent of the programming for most cable systems originating from a single source, as seventy-five percent of the nation's cable systems have twelve or fewer channels. The Affiliates also argue that there will be a great potential for collusive action to exclude STC's competitors, and that all of the above concerns are accentuated by the possibilities for cross-subsidization by Comsat (see paras 36–38, *supra*). STC would allegedly also have a competitive advantage over other programmers due to its integrated operation, as opposed to the common carrier/broadcaster combinations of FSS program suppliers.

59. Regarding STC's anticompetitive advantages within the DBS industry itself, the Affiliates argue first that Comsat will have the ability to cross-subsidize STC both directly (*e.g.*, from its government-franchised INTELSAT operation) and indirectly (*e.g.*, by receiving a lower loan rate due to use of Comsat's assets as security), thereby permitting predatory

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[59] According to the Affiliates, this conjecture results from "the chaotic procedural setting which makes it impossible to assess STC's possible impact with any precision, or the effect of any one DBS system without knowledge of the whole industry.

[60] Such transmissions would occur late at night or on sideband frequencies.

[61] This assertion rests on the presumption that STC's ability to reach rural areas of the country will make it the only or primary service with a "captive" market.

[62] The Affiliates allege that DBS receive antennae are expected to be available at a fraction of the cost of antennae currently used with Fixed Service Satellites. Furthermore, for the smaller cost, operators could receive three channels instead of one.

pricing to keep out its competitors. Secondly, the Affiliates see a danger of concentration of control if STC is allowed into the market before other DBS operators. They contend that entry costs to subsequent entrants will be higher as STC proposes to use the three frequencies with the least amount of established microwave use, thereby causing later DBS operators to incur a disproportionately high share of the cost of relocating microwave operators. Additionally, as more DBS operators are established, the resistance to further displacement of microwave users will increase, thus limiting the number of DBS operators, and resulting in further concentration of the industry in STC. It is stated that according to STC's own application, STC will be the primary program supplier in the large rural areas it claims exist. It is even conceivable to the Affiliates that the DBS industry will have such a considerable cost advantage in supplying programming that it will put other programmers out of business, thereby further exacerbating the effects of any concentration of control. The Affiliates insist that the Commission cannot rely on competition from the larger total 1985 video marketplace to reduce these effects at the same time that it claims that DBS will enhance diversity.

60. In opposition, STC states that it has no plans to enter the data transmission market. Regarding its entry into the video programming market, it disputes the suggestion that DBS operators will enjoy competitive advantages over the already entrenched firms which can be expected to provide stiff resistance to any DBS operator's entry into the market. Rather, DBS should have a healthy pro-competitive effect on an industry that is now concentrated to the extent that two firms command eighty-two percent of total subscribers. Regarding the Affiliates' contentions concerning the DBS market and STC's future anticompetitive conduct, STC states that those contentions are based on "mere surmise."[63] STC claims that the facts are that Comsat's international services are so structured and operated as to remove even the potential for cross-subsidization. Furthermore, the Commission is currently reviewing the structure and separation of Comsat's competitive and jurisdictional activities,[64] and STC will be subject to any resulting regulation. STC is already a separate entity, with its own officers, employees, facilities, and accounting books, and STC asserts that there has been no increase in Comsat's cost of capital to its international ratepayers from STC's activities to date.[65] Furthermore, the Commission has jurisdiction over Comsat's attribution of capi-

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[63] STC refers to the Affiliates' own description of the basis for their claims as "plausible scenarios, based on educated assumptions . . . [and] unknown variables. . . ."

[64] *Communications Satellite Corporation*, 81 F.C.C. 2d 287 (1980).

[65] STC submits the affidavit of Comsat's senior vice president for research and development and director of its labs, who avers that all work done in developing STC's DBS system has been billed directly to STC.

tal costs, and has exercised its authority in the past.[66] STC points out that other appeals to similarly limit Comsat's non-jurisdictional activity have been rejected by the Commission.[67] It also points out that both the Justice Department and NTIA rule making comments anticipate healthy pro-competitive benefits from the introduction of DBS service.

61. In reply, the Affiliates find STC's simple statement that it has no intention of entering the data transmission market less than reassuring, particularly since Comsat originally had no intention of entering any competitive business. It is asserted that STC's evaluation of its effect on the video programming market, and its conclusions that pay cable programming is presently concentrated are flawed in that they fail to account for the new pay services entering the market. They also reiterate that the long-term anticompetitive potential of a small-antenna, high-powered, integrated, multi-channel DBS system in competition with nonintegrated programming/FSS suppliers must be investigated before such a service can be authorized.[68] It claims that the certainty of cross-subsidization by Comsat is established in NAB's petition to deny. Moreover, it asserts that the Commission's presumed ability to police Comsat's accounting is not a sufficient response to the subject situation.

62. *Discussion*—Again, the starting point for our discussion here is the DBS *Report and Order* where the Commission considered questions related to the competitive atmosphere within which DBS operators would function, and found that it would be inappropriate at this time to impose substantial economic restrictions on DBS systems. Examining petitioners' allegations, we first conclude that there is no indication that STC will engage in data transmission with its DBS operation applied for here. In fact, the only available indication is to the contrary. In either case, Affiliates have not attempted to demonstrate in what way such activity would be necessarily anticompetitive. With respect to STC's alleged impact on the video programming market, Affiliates again have failed to demonstrate that anticompetitive misconduct will occur. Affiliates' contentions regarding the likelihood of cross-subsidization by Comsat are addressed at paras. 41–49, *supra*. Its alleged leverage in the pay cable market and advantages over terrestrial systems is strictly speculative, and fails to account for the entrenchment of the existing services, the strength and dominance of the current pay cable program suppliers, and

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[66] *Communications Satellite Corporation—Rate Investigation*, 56 F.C.C. 2d 1101 (1975); *aff'd in major part sub. nom. Communications Satellite Corp.* v. *F.C.C.*, 611 F. 2d 883 (D.C. Cir. 1977).

[67] *Communications Satellite Corporation-NPRM*, *supra* 291.

[68] The Affiliates contend that their inability to provide substantiated facts in support of their anticompetitive allegations is directly attributable to the "futility" of the Commission's procedures. Accordingly, they insist that plausible scenarios are all that is possible to advance in the absence of any information on the number of DBS systems reasonably likely to be accommodated or actually activated.

the probability that additional DBS broadcasters will also be competing. The possibility that any anticompetitive advantage can be taken is further obviated by the size and health of the competitive marketplace any DBS system will enter. We also are unpersuaded by petitioners' fears that STC will have an unfair competitive edge on other applicants by virtue of their early entry in the market. In particular, we note that the DBS *Report and Order* puts all first round applicants in the same position relative to existing microwave users of the 12.2–12.7 GHz spectrum. The alleged long-term anticompetitive effects of DBS' delivery system can be dealt with, if they arise, in the long term. As the Commission has already reiterated in the *Report and Order*, existing antitrust laws will cover most if not all of the potential abuses cited in the unlikely event of their occurence. Furthermore, the Commission is considering interim authorizations at this point and it has specifically reserved the right to impose regulations where necessary and appropriate after its observation of the development of the market. In light of the above, it is again concluded that petitioners have failed to raise any substantial and material questions of fact requiring a hearing under Section 309(e).

### *C. Regulatory Mode*

63. *Allegations*—Several petitioners question the Commission's decision to apply to applicants for interim DBS authorization only those regulations required by statute. They challenge particularly STC's nonadherence to the multiple ownership rules and the financial qualifications standards. MST, CBS, and the Affiliates maintain that these variations cannot be justified by the so-called "experimental" nature of the interim authorizations.

64. In this regard, MST challenges the *bona fides* of STC's proposed "experiment." It contends that regardless of STC's characterization, its proposal does not meet the standards for an experimental proposal.[69] Instead, MST claims that it is the first phase of the development of an ongoing commercial enterprise. Also, authorizing DBS would allegedly disrupt transmission by existing users of the 12.2–12.7 GHz spectrum, contrary to Section 74.103(d) of the Commission's rules. Furthermore, it would allegedly encourage the public to become dependent upon an "experimental" service with the potential for disruption if discontinued.[70] MST claims that the Commission has previously denied an application for an experimental authorization in a similar but less egregious case.[71] This case is more egregious because the enormous size of STC's investment

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[69] MST cites Section 74.131(a)(1) of the Commission's rules: "a definite program of research and experimentation in the technical phases of television broadcasting." 47 C.F.R. § 74.131(a)(1)

[70] MST cites *Teleprompter Corp.*, 12 F.C.C. 2d 936, 941 (1968), and *Northwest Television Broadcasting Co.*, 6 R.R. 1409 (1951).

[71] *Greater Washington Educational Television Association*, 53 F.C.C. 2d 910 (1975).

makes it less credible that the service would be abandoned after the experimental stage. CBS claims that STC fails to substantiate and/or describe its proposed experimental program.

65. ABC, MST, and NAB all specifically take issue with STC's proposed violation of various of the Commission's multiple ownership rules, and they argue that STC has failed to justify the nonapplication of those rules. They variously argue that STC's proposal provides for the violation of the Commission's duopoly, seven-station, one-to-a-market, regional concentration, multiple network, and newspaper cross-ownership limitations.[72] In particular, it is argued that STC's proposed operation would by itself violate these rules and that the multiple media interests of several members of Comsat's board of directors would also violate them. MST stresses the limitations put on major networks' affiliation contracts to ensure local licensee discretion,[73] and contrasts that with STC's proposed direct, undiluted control of every aspects of its national programming. MST also questions the competitive implications and the impact on media diversification raised by STC's proposed operation as both the selector and transmitter of its programming. Finally, MST questions the propriety of placing three national channels in the hands of an entity established by the government, whose principal mission is to operate government franchised monopolies. After further noting that three of the board members are appointed by the President, MST claims that STC's proposal would for the first time so concentrate media power that it could be susceptible to government dominance.

66. ABC stresses that the Commission's various multiple ownership rules are designed to promote diversity of programming and prevent concentration of control of the broadcast media. ABC alleges that STC's request for a waiver of ownership policies is based on its experimental nature, its highly competitive marketplace, and the so-called "barrier to entry" it faces.[74] ABC contends that STC has failed to support its claim that it faces such a "barrier to entry," and that a grant of its application would itself create a barrier to entry for any succeeding one-channel operator, including terrestrial STV stations. ABC next contends that the highly competitive video marketplace that STC claims exists may be justification for eliminating all multiple ownership restrictions, but not for granting STC a privileged position by selective application. Lastly, ABC submits that there is nothing truly experimental or pioneering about STC's proposal, and that it merely represents an experiment in

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[72] MST specifically cites Sections 73.636(a)(1), 73.636(a)(2), and 73.658(g) of the Commission's rules. 47 C.F.R. § 73.636(a)(1), 73.636(a)(2), and 73.658(g).

[73] MST refers to Section 73.658(a), (c), (d), (e)(1), (e)(2), and (h). 47 C.F.R. § 73.658.

[74] Briefly, STC contends that its DBS system must be able to offer a certain minimum number of channels in order to offer enough programming (and counter-programming) to be sufficiently attractive to command enough subscribers to justify the undertaking.

marketing. ABC argues that STC is similarly situated to other broadcasters because it will compete directly with STV systems for individual suscribers. ABC argues that the *Domsat* precedent advanced by STC in its application is wholly inapposite because it involves the introduction of a totally new service rather than duplication of existing technology. It insists that a terrestrial broadcaster would never be relieved of these regulations, and that the method of program distribution cannot be allowed to obscure the similarity of the licensees' situations. ABC asserts that the Commission cannot sidestep the issue by applying only statutory provisions to interim DBS and that an agency "cannot act arbitrarily nor can it treat similar situations in different ways." In support, ABC cites *Burinskas* v. *National Labor Relations Board*, 357 F. 2d 822, 827 (D.C. Cir. 1966).

67. NAB argues that STC has not demonstrated that multiple channels are necessary for economic feasibility and that STC itself projected that a two channel system would attract enough subscribers to compensate it for taking the risk of this DBS venture. NAB concludes that these facts raise such profound public interest questions that a hearing under § 309(e) of the Act is required. In support, NAB cites *Citizens TV Protest Committee* v. *F.C.C.*, 348 F. 2d 56 (D.C. Cir. 1965). If the multiple ownership rules are to continue to be applied to terrestrial broadcasting, evenhanded application of those rules requires their application to satellite-to-home broadcasters as well.

68. NAB also contends that financial qualification standards should apply to DBS applicants, including STC. It finds them even more appropriate for DBS than for conventional broadcasters because DBS is "an extremely high-cost, high-risk marketing venture with no track record of success."[75] Furthermore, argues NAB, grant of an authorization to a company that ultimately fails would waste valuable spectrum space for years, due to the long lead time involved in launching a new service. Such a failure would also injure subscribers who had invested in home equipment for a particular operator, claims NAB. It further argues that undocumented certification of financial ability, which has been adopted for other broadcast applications,[76] should not be permitted for DBS applicants, due to the enormous investment required and the detriment to the public interest of an improvident grant. NAB points out that when the Commission adopted the certification rule, it stressed that it was not changing the underlying criteria for financial qualification. It concludes that as evidence is available in STC's application regarding its financial qualifications, that evidence should be considered, notwithstanding self-certification of financial ability.

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[75] NAB petition at p. 38.

[76] See, *e.g.*, *Revision of Form 301*, FCC 81–278, released October 18, 1981, 50 R.R. 2d 381, 382 (1981).

69. MST argues that STC's application should be designated for hearing on a programming issue in the traditional broadcast application context. According to MST, it is uncontested that by the time STC could be in operation other services will be distributing the kinds of programming STC proposes to transmit.[77] MST states that because that finding undercuts any ground for finding that a grant of STC's application would be in the public interest, STC's application must be denied without hearing. MST argues that to now reject that finding would also require a hearing to determine what programming contribution STC would make.

70. STC contends that the Commission has the authority to exempt DBS operators from the rules governing ownership of established broadcast facilities, and that the Commission has departed in the past from conventional regulation where the development of a new service was involved.[78] With regard to ownership regulations specifically, STC notes that the Commission relaxed its restrictions for both UHF and FM services in order to promote the growth of those services in the interest of wider service and diversity. It notes that with regard to multiple channel operation, the Commission relaxed restrictions for pay cable finding it inappropriate to have rules during the developmental phase of a new technology that would constrain experimentation and innovation. In support, STC cites *CATV Report and Order*, 36 F.C.C. 2d 143, 197 (1972); *recon. den.* 36 F.C.C. 2d 326 (1972); *aff'd sub nom., ACLU* v. *F.C.C.*, 523 F. 2d 1344 (9th Cir. 1975). STC argues that in the present case, nonapplication of those policies will advance their underlying purpose. It argues that the operation of multiple channels will improve the ability to provide diversity, including narrowcasting, and will spread out the risks of new programming services thereby encouraging them, while the marketplace will prevent any abuse of power the policy was designed to prevent. Other applications of ownership rules could discourage participation in DBS, it continues, thereby reducing the diversity the rules intended to advance. STC maintains that a DBS operator is in a different position than a terrestrial operator in this respect for a variety of reasons.[79]

71. *Discussion*—The Commission has the authority to establish regulations as required to achieve its statutory objectives, and it is not required to apply the same regulation to different situations without regard to its effect on the achievement of these statutory objectives.[80] The petitioners'

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[77] MST finds agreement in STC's application and the Commission's Office of Plans and Policy Staff Report.

[78] STC uses the examples of Domsat (citing *Domsat Second Report and Order*, 35 F.C.C. 2d 844 (1972)), and the relaxation of rate regulation for leased voice-grade channels (*American Satellite Corp.*, 55 F.C.C. 2d 1 (1975)).

[79] STC cites lead time, the high cost of entry, dynamism of the marketplace, evolutionary nature of the current technology, the unfamiliarity of the home equipment, and the need to adjust to changes in the economic and technological marketplace.

[80] This authority and its exercise are noted in para. 70 above, and accompanying notes.

objections to the Commission's specific choice of regulations for DBS have already been addressed in the *Report and Order.* In that *Order* the Commission determined that the public interest is best served by a minimum of regulation of DBS during this initial stage in order to encourage and facilitate the introduction of this new service and to allow operators the flexibility to experiment with service offerings and technical and organizational characteristics to find those which best serve the public. Thus, no multiple or cross-ownership rules were imposed on interim systems. It further found that this approach also permits the Commission the opportunity to accumulate information about the operation of the industry so that better informed decisions regarding eventual permanent regulatory policy can be made. The Commission decided that imposing restraints prematurely and without sufficient information may needlessly reduce the desirability of the service to the public and increase potential applicants costs and risks, thus preventing or impeding utilization of the service with no apparent corresponding benefit.

72. The Commission further determined in the *Report and Order* that multiple and cross-ownership restrictions, intended to prevent excessive market power and to promote diversity in other contexts, are unnecessary and perhaps counterproductive for DBS. Promotion of diversity and the First Amendment rights of free expression and public access to diverse ideas and points of view ere said to be well served by the introduction of DBS service. In addition, the *Report and Order* assumes that DBS apparently does not enjoy economies of scale sufficient to encourage or result in domination of a market. Cross-ownership of DBS by other media interests would appear to create no serious threat of concentration of control, due to the large number of alternate sources in most places.[81] Furthermore, the *Report and Order* found that there is likely to be sufficient competition in the video marketplace to prevent monopolistic pricing or other abuses. STC's operation would provide no more "barrier to entry" to succeeding applicants, as asserted by ABC, than another initial applicant's operation would. Contrary to MST's assertion, we can find no adverse implication for media diversification from STC's (and other DBS applicants') proposal to operate as supplier and transmitter of its programming, and no such implications are advanced in any concrete form by petitioners. MST's premise that a single DBS system will dominate the video programming market is unsubstantiated and its resulting fear that STC will be subject to government interference is unfounded. Generally, the potential benefits associated with the imposition of multiple and cross-ownership rules for DBS systems do not appear to be outweighed by the risks. The existing antitrust laws will protect the

[81] The *Report and Order* also found that the likelihood of dominance resulting in restriction of service in areas with few sources appears to be small. Petitioners have not challenged that determination.

public in any event. Additionally, we reiterate that we are dealing with interim authorizations at this point, and we have expressly reserved the right to impose regulations, if the necessity becomes clear, based on information of the workings of the marketplace with DBS.

73. The open and flexible regulatory mode adopted for interim DBS authorizations is adequately based on several justifications, including the propriety and effectiveness of specific vs. general regulations at this stage, the lack of information upon which to base more restrictive regulation, the openness and flexibility desired during the initial development of this new service, and the ultimate benefits of DBS service. We find additional justification in the many experimental aspects of STC's proposal. STC did not apply for authorization in the Experimental Services under Part 5 of the Commission's rules, nor did it apply for an experimental authorization under Section 73.1510 of the Commission's rules. There are subtle distinctions in the uses of the term "experimental," and in this case we are not bound by the usual perception of specified scientific experimentation. See *Report and Order*, at paras. 83, 84; *Notice and Policy Statement*, at 751. Moreover, STC's DBS system will be utilizing some techniques and parameters that have not undergone extensive testing here in the United States. These are: high-powered tube amplifiers for long operational periods in space, *i.e.*, 7 to 10 years; shaped beams for highly irregular areas, *e.g.*, time zones/U.S. international borders; and practical utilization of small diameter dish antennae, *e.g.*, 2 to 3 feet.

74. In addition to the technical experimental observations mentioned above and others, including HDTV,[82] STC's greatest utility for regulatory purposes will be in the generation of solid data and experience in the marketing area. The value of such "experimental" operation and the information it generates has been recognized in the past.[83] While the technology appears to have developed sufficiently to allow many safe technical assumptions in implementing a DBS system, there remain

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[82] While STC does not plan to do research development of HDTV, they propose to incorporate the capability for experimentation with such techniques. STC plans to make that capacity available to qualified parties interested in development of HDTV specifications for demonstration and test purposes during periods when normal broadcast transmissions are terminated. STC's application states a capability that will allow comparative assessment of both digital and analog transmissions. In addition to its normal channel bandwidth input filter, STC plans for one transponder to incorporate a wider bandwidth (28 MHz) input filter to permit transmission of ground command of experimental HDTV chrominance signals when dual frequency approaches are employed. A 100 MHz bandwidth input filter has also been planned by STC to be added to another transponder for HDTV digital transmission experiments. STC states that this wideband channel would also be used for luminance transmission during analog HDTV experiments. Output filters of these two transponders will not be switched but will have sufficient bandwidths to pass either normal or HDTV transmissions.

[83] *MARISAT*, 40 F.C.C. 2d 496 (1973); *DOMSAT*, 22 F.C.C. 2d 86 (1970).

many uncertainties as to how effectively and readily DBS service will progress and penetrate the video market.[84]

### *D. Section 307(b) Issues*

75. *Allegations*—ABC and NAB argue that a grant of STC's application would violate Section 307(b) of the Communications Act. ABC asserts that this conclusion is affirmed by STC's instant application in which STC admits that it will not, and could not, provide local service of any kind.[85] ABC and NAB claim that Section 307(b), in obligating the Commission to "distribute" licenses and frequencies "among" this country's "States and Communities" in an equitable manner, requires a system of local broadcasting. ABC argues that the statute intended to ensure that small communities would receive local service. ABC claims that this interpretation is supported by the Commission's *Sixth Report and Order on Television Assignments*, 41 F.C.C. 148, 171–72 (1952), wherein the Commission recognized that Section 307(b) required it to "mak[e] it possible . . . for a larger number of communities to obtain television assignments of their own." NAB also refers to the Court of Appeals' statements that: "In requiring a fair and equitable distribution of service Section 307(b) encompasses . . . community needs for programs of local interest and importance and for organs of local self-expression;"[86] and that "local transmission service bestows such important benefits that we have consistently interpreted Section 307(b) virtually to ensure an applicant for first local preference over one who proposes merely to complement preexisting local operations."[87] ABC and NAB claim support for their position in the Court's statement that "the Commission has been charged with broad responsibilities for the orderly development of an appropriate system of local television broadcasting." *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 177 (1968). NAB also refers to *U.S.* v. *Midwest Video Corp.*, 406 U.S. 649, 661–62 (1972).

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[84] STC's application states that its experiment will require high powered 12 GHz traveling wave tube amplifiers with longer lifetimes than satellites used to date. In general, the experiment will be formulated to acquire technical and operational data and experience concerning the use of DBS technology. This is the only reliable means of obtaining data on any limiting effects of local blockages (*e.g.*, trees, buildings) on service to television households. Other goals of the experiment will include evaluation of the market acceptability of satellite subscription TV and its significance as an additional source of financial support for the expansion of television services. In addition to gauging the public demand for the proposed service, the experiment will explore the various services which can be provided effectively by this medium and will ascertain the costs involved in establishing and maintaining a DBS system.

[85] ABC disagrees with STC's assessment that DBS technology is incompatible with the existing system of local service.

[86] *Pinellas Broadcasting Co.* v. *F.C.C.*, 230 F. 2d 204, 207 (D.C. Cir. 1956), *cert. den.*, 350 U.S. 1007 (1956).

[87] *Pasadena Broadcasting Co.* v. *F.C.C.*, 555 F. 2d 1046, 1050–51 (D.C. Cir. 1977).

76. ABC challenges the authority STC uses to support its position that its proposed DBS operation will not violate Section 307(b) of the Communications Act. NAB challenges the same authority relied on by the Commission in the *Notice*. They argue that the provisions of the Act cited by STC and by the Commission are general provisions (*e.g.*, §§ 1, 303(g)), and that specific statutory terms, such as Section 307(b), prevail over general terms.[88] NAB argues that the general expressions of goals and policies in Sections 1 and 303 do not purport to prescribe a specific licensing scheme as Section 307(b) does. ABC maintains that STC's reliance on AM clear channel stations as examples of nonlocal service are unavailing as those stations are part of the allocations scheme fashioned pursuant to the Commission's 307(b) mandate. It points out that in modifying the clear channel scheme, the Commission stated that one of the basic goals comprehended within Section 307(b) was the establishment of "outlets for local self expression addressed to each community's needs and interest." *Clear Channel Broadcasting*, 78 F.C.C. 2d 1345, 1349 (1980). NAB concludes that because this local licensing scheme is statutorily mandated, Congressional action is required to change it.

77. The Pueto Rico Mayors Association argues that STC's application is defective under Section 307(b) because it does not cover the entire United States, specifically the islands of Puerto Rico and the U.S. Virgin Islands, and thus fails to achieve the Act's objective of making modern telecommunication services available to all people in the country.

78. STC responds that in requiring the equitable distribution of service throughout the country, the Communications Act requires that service, not facilities, be equitably distributed. It relies here on *New Jersey Coalition for Fair Broadcasting* v. *F.C.C.*, 574 F.2d 1119 (3d Cir. 1978). It continues that localism was devised as a means to achieve this statutory obligation given the geographically limited signal capabilities of the time, but that local assignment of facilities is not the only means to achieve equitable service. STC cites the repeal of the Davis Amendment[89] as a demonstration of Congress' realization that geograhic restrictions on the Commission's discretion in making allocations defeated, rather than advanced, the goal of bringing service to as many Americans as possible. STC also cites the *Sixth Report and Order supra*, for its proposition that the goal of service to all members of the public has priority over the establishment of local stations in every community. STC further argues that even if localism is favored in the Communications Act, it is not intended to be the exclusive means of distribution of service and a bar to

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[88] ABC and NAB cite several cases in support including *Clifford E. MacEvoy Co.* v. *U.S.*, 322 U.S. 102 (1944); *D. Ginsberg & Sons* v. *Popkin*, 285 U.S. 204 (1932); *AT&T* v. *F.C.C.*, 487 F. 2d 865 (2d Cir. 1973); and *N.A.R.U.C.* v. *F.C.C.*, 533 F. 2d 601 (D.C. Cir. 1976).

[89] Davis Amendment, ch. 263, § 5, 45 Stat. 373 (1928); repealed, Act of June 5, 1936, ch. 511, § 1, 49 Stat. 1475. The Davis Amendment required equal distribution of facilities among the states.

nonlocal assignments. In support, it cites *Malrite T.V., Inc.* v. *F.C.C.*, __ F. 2d __ (2d. Cir., 1981). In this connection it also notes that the Commission has in the past authorized nonlocal supplements to improve the distribution of service.[90] Thus, concludes STC, Section 307(b) does not preclude nonlocal authorization, and its goal of improved areas of service is actually advanced by DBS.

79. *Discussion*—These arguments are largely repetitious of those already considered in the DBS rule making proceeding. The Commission's authority to authorize nonlocal broadcasting services was determined in the *Notice*, and affirmed in the *Report and Order*. The Commission found that it has broad discretion to determine the means to achieve its statutory obligation to provide a "fair, efficient, and equitable distribution of radio service" across the nation.[91] The policy of localism underlying Commission regulation of broadcasting to date has been adopted as a matter of Commission discretion, not statutory requirement, and is not the exclusive means for achieving the Act's goal of equitable distribution of service to the public. Thus, the authorization of a nonlocal service is not prohibited where it advances the goals of the Communications Act generally and Section 307(b) in particular.[92] Furthermore, full utilization of the satellite technology offered by DBS is fully consistent with the other provisions of the Communications Act. It especially fulfills the Commission's obligation "to encourage the larger and more effective use of radio," under Section 303(g) of the Act.[93]

80. We do not herein require STC to cover Puerto Rico or the Virgin Islands or any other specified area. We believe that DBS service will increase the quantity and quality of broadcast service to all people of the country,[94] and in fact that is one basis for our action in authorizing the service and in adopting the procedures and rules we now apply.

### *E. Efficient Use of the Spectrum in the Public Interest*

81. *Allegations*—MRFAC, AFTRCC, AAR, UTC, Buford, Cleveland Associates, Farinon, NAB, and the Affiliates all argue that STC's pro-

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[90] STC argues that the Commission's authorization of AM clear channels establishes its authority to delineate nonlocal geographical service areas, and that the local responsibilities of the clear channel licensees are a separate issue.

[91] *Report and Order, supra*, at para. 31, citing *F.C.C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943).

[92] This determination does not conflict with *Pinellas Broadcasting, supra*, or *Southwestern Cable, supra*, cited by petitioners, which in no way indicate an exclusive preference for strictly local authorizations under the Act. *Pasadena Broadcasting*, cited by NAB, supports the position taken in the *Report and Order*, recognizing that in enacting Section 307(b), Congress was concerned that radio service be expanded to as large an audience as possible, and that this goal could even be considered the Commission's *raison d'etre*.

[93] Section 307(b) is not "specific" in requiring a particular authorization scheme, as argued by petitioners, and does not "prevail" over Sections 1 and 303 with which it is entirely consistent.

[94] We note that there are two applications on file which include proposals to serve Puerto Rico. While we do not know at this time whether they will be authorized or put into operation, our action here in no way precludes their service.

posal will interfere unacceptably with existing use of the spectrum by terrestrial users. These parties further argue that there are also a variety of other uses, including HDTV, whose accommodation and significance the Commission must consider before making a dedication of the spectrum to DBS.

82. MST challenges the extent of the "benefits" STC's proposed service would allegedly provide. MST first contests STC's claims regarding the rural service it will provide.[95] It claims that 99.9% of all homes with electricity (all but 80,000) have television sets. It contends that STC's assertions regarding the level of rural service are based on a questionable 1973 study, prior to the introduction of 100 new television and 1500 new translator stations and a significant spread in cable service. Furthermore, it claims, STC's proposal is technologically ill-suited to serve the unserved and underserved areas.[96] MST questions whether STC can afford to install and service equipment in sparsely populated areas, contrasting this situation to the existing use of translators, which it asserts does not require home-by-home installation or maintenance. MST also argues that STC should have specified how many of these unserved homes are in the Eastern Time Zone, which it proposes to serve initially.

83. MST disposes of three benefits claimed by STC[97] in short order, arguing that they are undercut by STC's own assertion that the same type of service it proposes will be provided by other sources.

84. MST proposes for hearing STC's claimed benefits of "advancing FCC goals concerning experimentation with new uses of radio," "preserving the United States' leadership in space technology," and "promoting economic activity and expanding employment opportunities in the United States." Regarding the first two, MST argues that other uses of the spectrum would be more innovative and thus better further those goals than STC's proposal which uses established technology. Regarding the last, MST argues that that result must be compared in a hearing to the economic consequences of other possible uses of the spectrum. Virtually all of these petitioners contend that these allegedly questionable or nonexistent benefits will come at the unacceptable expense of a significant reduction in local services.

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[95] MST points to STC's claim that 1.2 million American homes are not now served by conventional television.

[96] MST contends that the Mountain Time Zone contains much of the poorly served area, but STC's low angle of delivery coupled with the high mountains in that area would severely impair reception. Other rural areas are heavily forested, according to MST, which creates a severe impediment to the necessary line-of-sight reception. MST suggests that the extent of timber cutting necessary to overcome the latter problem calls for the submission of an Environmental Impact Statement.

[97] These alleged benefits are: satisfaction of consumer demand for diversified home video services, enhancement of competition in the subscription television and program distribution markets, and stimulation of the program production industry.

85. STC contends that while HDTV is a desirable service, it provides a one-dimensional benefit where DBS provides a variety of benefits. Furthermore, it claims, HDTV service is several years from reality and DBS should not be held up in the meantime. In any event, claims STC, HDTV should not be allocated the entire frequency band at issue, so that interim authorizations can begin before definite allocation decisions are made.

86. NTCA supports STC's application, arguing that its service will reduce the cultural disparity in various areas of the country, provide information and education to rural areas, allow narrowcasting to support special interest programming, and possibly provide important agricultural information such as weather, commodities, livestock and crop prices via its planned teletext service.

87. *Discussion*—The issues raised in these respects by petitioners have been settled in the *Report and Order*, and do not require further consideration based on petitioners' submissions. The Commission explicitly recognized the significance of fixed service users, but found that interim rules could permit DBS operation with minimal impact on those operators. Due to the construction and launch time involved in DBS, the Commission found that authorizations could be granted and construction begun before all the details of necessary accommodation are worked out. It further found that the potential benefits of DBS justify some adjustments in other services.

88. Those various benefits of DBS service were stated in the *Report and Order*, and the petitioners' contrary arguments fail to reduce their significance. DBS signals can be received with essentially the same signal quality in all areas, advancing the Commission's statutory goals of providing equitable service throughout the country. Additional channels, for which the Commission found an unmet demand, would be available across the country. The increase in channels and national access will permit special interest programming as well as a general increase in the quality of programming. Finally, many of the DBS applications already received have proposed innovative services such as HDTV, stereo sound, teletext, and dual-language sound tracks. DBS also has great potential for a variety of other nonentertainment service (similar to those touted for fixed service users), such as educational programming and the transmission of medical data.

89. The charges by MST that STC's DBS service cannot serve rural areas as effectively as other existing services is contrary to the records in the rule making and in this application. The comments by the National Telephone Cooperative on this application note, for example, that DBS is the only technology capable of addressing the problem of inadequate television service to rural areas. Likewise, NTIA has taken the position that DBS is probably the least expensive way to serve areas of low

population density. At the same time it is useful to note that although the Eastern Time Zone contains areas of great population density that are currently well served by existing television, the Eastern region of the United States also contains a significant portion of the nation's rural residents. STC cites 1970 Census figures which indicate that 57% of America's rural residents live in the Eastern region which is comprised of 22 Eastern states and the District of Columbia.

90. The Commission stated that the record did not justify a reservation for terrestrial HDTV at the time of the *Report and Order*, and petitioners have offered nothing to change that record or conclusion.[98] The *Report and Order* also dispelled any question as to whether some part of the spectrum should be reserved for fixed satellite users. The Commission found several specific advantages in the amount of spectrum specified for DBS, including maximization of the number of channels receivable by home antennae (increased viability from reduced consumer costs), increase of competition by decrease in risk to subsequent DBS operators, greater technological and operational flexibility, and increased possibility of future large space communications platforms.

### *VII. STC's Qualifications*

91. *TECHNICAL*—The *Report and Order* stipulated that DBS applicants are required to conform to the technical guidelines specified in the WARC–77 Final Acts. Furthermore, all interim authorizations will be subject to modification, as the Commission deems necessary, in order to comport with determinations made at RARC–83. Until the Conference has adopted a Plan for Region 2 and has prescribed technical parameters, it will not be possible to establish the specific portions of the usable orbital arc which will be assignable to particular systems, or to determine the precise system parameters which it will be possible to authorize. Thus, all authorizations issued before the Conference will be subject to such modification of proposed system parameters and such other prescriptions as Conference decisions may necessitate. Deviations from the guidelines of the WARC–77 or from the outcome of RARC–83 may be permitted with Commission approval provided they do not cause interference to operational or planned systems of other administrations in excess of that specified in the Final Acts of the WARC–77 or RARC–83.

92. In its application, STC states that it intends to utilize PAM-D class satellites generating a prime DC power of approximately 1700 watts at the "end of life" (over 2000 watts at beginning of life). Each satellite will have three operating traveling wave tube amplifiers (TWTAs) with an RF output of about 185 watts at the "end of life" (215 watts at the beginning of life). The resultant equivalent isotropically radiated power (EIRP) and

[98] The Commission does permit HDTV transmission via DBS.

power flux density (PFD) at edge of coverage are typically on the order of 57 dBW and $-105$ dBW/m$^2$, respectively. This EIRP and PFD is consistent with the Final Acts of WARC–77 and U.S. preparations for the RARC–83. STC also states that it will employ shaped beam satellite antenna patterns serving four service areas within the continental United States (CONUS) plus Alaska and Hawaii. STC states that the contours of these service areas were chosen to maximize transmission efficiency and to minimize, to the extent practicable, any signal radiated over foreign territories. The WARC–77 plan was based upon elliptical antenna patterns that covered the entire designated service area, and usually a considerable amount of territory outside it, within a 3 dB contour. While it is not clear whether RARC–83 will use elliptical or shaped beam antenna patterns for planning purposes, it would appear that STC's shaped beam pattern would generally be compatible with (*i.e.*, would cause less interference than) an elliptical pattern providing service to the same area and is also consistent with U.S. preparations for the 1983 RARC. STC's choice of 4 CONUS service areas also appears likely to be compatible with the outcome of the 1983 RARC.

93. The Final Acts of WARC–77 recommend an 18 MHz necessary bandwidth for Region 2 individual reception systems. Based on preparations undertaken for the 1983 RARC, it now appears that a wider bandwidth may be used for planning purposes. Furthermore, the United States is presently attempting to develop a planning approach for the 1983 RARC that would permit administrations the flexibility to implement systems employing a variety of channel bandwidths (*e.g.*, for HDTV). Accordingly, it would appear that STC's choice of a 16 MHz bandwidth would be compatible with any likely outcome of the 1983 RARC.[99]

94. Accordingly, we believe the STC broadcast signal quality objectives and system parameters are generally consistent with those adopted for Region 2 in the Final Acts of WARC–77. Further, STC's application states that a small number of changes in technical characteristics were made from those described in WARC–77 in order to achieve STC's quality objectives at minimum cost and to maximum power and spectrum efficiency. However, STC asserts and our review indicates that its satellite construction program contains sufficient flexibility to enable it to adjust its parameters to accommodate any likely outcome of RARC–83.

95. *CHARACTER*—NAB questions whether Comsat has the basic qualifications to be a FCC licensee in light of the complaint filed by Western Union International ("WUI") on January 28, 1980, against Comsat alleging violations of §§ 201(b) and 202(a) of the Communications

[99] We will allow applicants the opportunity to amend their applications to utilize the channel bandwidth eventually adopted at the 1983 RARC, if they so desire.

Act[100] and § 201(c)(2) of the Communications Satellite Act. WUI alleged that Comsat violated these provisions and engaged in anticompetitive conduct by using lower rates for its own proposal than those quoted to WUI and other carriers for satellite circuitry. This circuitry could only be obtained from Comsat, and was necessary for the contract bids solicited by the Defense Communications Agency (Department of Defense). NAB requests that no action be taken until the completion of the hearing, presumably anticipating that a finding that the statute(s) had been violated would so impugn Comsat's character as to disqualify STC from becoming a DBS licensee. Since the filing of NAB's petition, an initial decision has been rendered by Administrative Law Judge Edward J. Kuhlmann finding, *inter alia*, that Comsat violated the Communications Act and the Satellite Communications Act. *Western Union International, Inc.* v. *Communications Satellite Corporation*, CC Docket No. 81–356 (released December 10, 1981). Exceptions to the Initial Decision have been filed, and a final decision by the Commission has not been rendered.

96. We do not believe it is necessary to resolve this issue in the present procedural context.[101] As previously noted, the grant contemplated herein is conditional in nature. It does not assigned frequencies or orbital locations, and it does not confer launch or operational authority. Such matters will be considered after the conclusion of RARC–83, upon application for launch and operational authority. By the time Comsat applies for that authority the Commission will have had the opportunity to review the Initial Decision in the matter of WUI's complaint against Comsat. On the basis of that final decision, we will be in a better position to weigh the effect of Comsat's conduct on basis character qualifications of its subsidiary, STC. Accordingly, any consideration of NAB's allegations regarding the character qualifications of STC will be held in abeyance until after the Commission has reached a final decision in the WUI complaint proceeding. See *RKO General Inc. (KHJ-TV)*, 44 FCC 2d 149 (1969) *Aff'd. sub nom. Fidelity Television, Inc.* v. *F.C.C.*, 515 F. 2d 684 (D.C. Cir. 1975).

97. *FINANCIAL*—Although several petitioners raised issues relating to STC's financing,[102] only NAB raises matters relating to basic financial

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[100] NAB mentioned in its petition that STC did not disclose the WUI complaint in its application, but dismissed the failure to disclose as "inadvertent." We find that there was no violation in this regard because there were no specific application requirements in effect at the time STC submitted its application. Furthermore, the *Notice*, which was later released on June 1, 1981, did not require the disclosure of information required by Section II(8)(e) of FCC Form 301. Hence, there was no obligation to amend its application to disclose the suit filed by Western Union International.

[101] We also note here that parties have argued that because STC has considered partners for its DBS operations, the Commission at this time cannot make a full evaluation of the qualifications of potential partners. There being no partners at this time, STC is the only party properly subject to a licensee qualification review.

[102] Other financial issues, *i.e.*, cross-subsidization, competitive impact, etc., are discussed in the appropriate sections of this *Order*.

qualifications of STC. Specifically, NAB questions the actual availability of each of the three sources of funds STC has identified in its application: bank financing, capital transfer from Comsat, and first-year revenue. STC's bank financing plan is based on the availability of $400 million through Chase Manhattan Bank. The bank has agreed to arrange and participate in a consortium with up to 15 other banks. NAB argues that the consortium is not yet arranged and that Chase Manhattan's representations do not constitute a commitment sufficient to establish the availability of funds. In support, NAB cites *A. H. Belo Corp.*, 40 F.C.C. 2d 1131. NAB further argues that STC has not met the Commission's standard for demonstrating sufficient net liquid assets to meet construction and first year operating costs (*i.e.*, Section III, Question 4(b) of FCC Form 301) because STC relied on financial projections of available liquid assets through 1986 rather than liquid assets currently available. Lastly, NAB argues that STC's reliance on anticipatd first-year subscriber revenues of $98.8 million is wholly speculative and consequently may not be relied upon for the purposes of showing financial qualification. Because of the high-cost, high-risk nature of DBS, NAB states that the Commission should require applicants to demonstrate financial qualifications and not yet rely upon certifications of financial qualification. Also, using STC projections, NAB asserts that STC will have only $271.6 million to cover $290.3 million in second-year operating costs, implying that STC will need additional funding in its second year. By NAB's projections this shortfall will be much greater. NAB concludes that STC "manifestly lacks sufficient second-year revenues to meet its second-year costs" and that a second-year financial issue should be designated against STC.[103]

98. The Commission determined in the *Report and Order* that a different financial standard should be applied to applications for interim DBS systems. Specifically, it was stated therein that "[i]n lieu of stringent financial showings and subsequent Commission analysis, we will require that parties granted authorizations proceed with diligence in constructing interim DBS systems." *Report and Order,* at paragraph 114. Specifically, applicants granted construction permits must begin construction or complete contracting for construction of the satellite station within one year from the grant of the construction permit, and must begin operation of the satellite station within 6 years from the grant of the construction permit. Nothing in the record here causes us to question STC's ability to obtain the financing needed to fulfill its obligations. Thus, under the requirements of Section 309(e), no petitioner has presented a substantial and material question relating to STC's financial qualifications. Therefore, no hearing is warranted on the financial qualifications issue.

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[103] NAB Petition to Deny, relies on *J. Sherwood, Inc.*, 63 F.C.C. 2d 151 (Rev. Bd. 1976); *Town and Country Radio, Inc.*, 58 F.C.C. 2d 48 (Rev. Bd. 1976).

*IX. Motion for Stay*

99. On August 11, 1982, National Christian Network ("NCN") filed a Motion for Stay, requesting that the Commission not take any action on the first round of DBS applications untl NCN's appeal from the return of its DBS application has been finally adjudicated. (See footnote 13, *supra.*) Oppositions to the Motion for Stay were filed by STC, United States Satellite Broadcasting Company, Direct Broadcast Satellite Corporation, and Western Union Telegraph Company. To warrant a stay of Commission action, a party must show that it will be irreparably injured without the stay, that the grant of the stay will not substantially harm other interested parties, that grant of the stay is in the public interest, and that it is likely to prevail on the merits of its appeal. *Virginia Petroleum Jobbers* v. *F.P.C.*, 259 F. 2d 921 (D.C. Cir. 1958); *Washington Metro Areas Trans. Commission* v. *Holiday Tours, Inc.*, 559 F. 2d 841 (D.C. Cir. 1977). It does not apear that NCN has made the requisite showing, and a stay will not be granted.

100. NCN argues that it would be irreparably injured by the grant of any first round applications because such applicants would receive priority consideration in the spectrum and orbital allocations which would take place after RARC–83, and the chances of any subsequent applicant receiving an allocation of spectrum would be substantially reduced. NCN further asserts that the second round of applicants for DBS authority may suffer considerable delays before their applications are accepted and cut off, and that applicants that seek financing after the first round may find it more difficult to compete for the capital necessary to construct a DBS system. Moreover, NCN alleges that the first round applicants will not be harmed by a grant of the stay because they cannot initiate service until the conclusion of RARC–83, and that they have not yet expended any monies on the construction of their systems. Petitioner also asserts that the public interest would be served by a grant of the stay because it was the only religious based applicant in the first round, and it has proposed a variety of services including open access for religious, educational, cultural and childrens programming. Finally, NCN argues that it is likely to prevail on the merits of its appeal from the return of its DBS application.

101. NCN has not established that it would suffer any irreparable injury in the absence of a stay. On the contrary, if NCN were to prevail in its appeal, its application would be considered in the first round and it would receive the same frequency and orbital position priority as other first round applicants. Likewise, the delays suffered by subsequent applicants will not be suffered by NCN if its application is reinstated by the court. Finally, NCN's contentions on possible difficulties in obtaining financing are far too speculative to constitute irreparable injury. NCN

has also failed to establish that other parties would not be harmed by the grant of the stay. It is true that launch and operation of a DBS system will have to await the conclusion of RARC–83. However, considerable lead time is necessary to construct satellites. The grant of STC's application herein, and the expeditious subsequent consideration of the remaining first round applications will permit the applicants to undertake the necessary first steps towards the construction of their systems, so that service can commence as soon after RARC–83 as possible. A stay in the processing of these first round applications would delay the ability of those applicants to commence service. Such delays would inure to the detriment of both the applicants and the public, whose enjoyment of this new service would also be delayed.

102. Thus it appears that NCN would not be irreparably injured by the processing of the first round of DBS applications. It further appears that a stay of processing would injure the other DBS applicants and the public interest by delaying the institution of this service. Finally, the Commission has been given no reason to change its position on the merits of NCN's case now on appeal. Accordingly, the Motion for Stay will be denied.

103. We also note here that the Direct Broadcast Satellite Corporation (DBSC) and the National Association of Broadcasters informally requested specific actions related to the processing of these applications. DBSC requested that all the applications in the first cut-off list be processed in an expedited manner, and that the Commission consider all construction permits for first round applicants at the same time. DBSC states that delayed processing of these applications will impose substantial economic hardship on the applicants, and would frustrate the Commission's objective of facilitating the introduction of new communications services. DBSC also claims that sequential processing of applications would pose substantial competitive hardships on the later processed applications. NAB seeks delay in processing these applications until the outcome of its appeal of the DBS *Report and Order* has been adjudicated. In the alternative, NAB seeks delay of processing either by having the Commission consider all first round applications at the same time or by deferring all processing until after RARC–83.

104. At this time the Commission is pursuing an expedited schedule for processing all remaining applicants on the first cut-off list and expects to consider them in the next several weeks. This expedited processing schedule is designed to further the Commission policy of facilitating the rapid development of DBS service. One element of this is to provide the United States team at RARC–83 with fully-developed and tangible United States requirements for DBS spectrum space and orbital locations. In addition, expeditious processing facilitates the satellite construction and launch preparations as well as other business plans of each applicant. This

should significantly decrease the time required for companies to offer DBS service. On the other hand, no legal rights of any party would be compromised by the grant of conditional construction permits as they are prepared by the staff. At first round applications have the same priority for spectrum and orbital assignments and no question of mutual exclusivity yet exists that would require that all acceptable applications be considered concurrently.

### *X. Conclusion*

105. Accordingly, IT IS ORDERED, That the petitions to deny filed by the National Association of Broadcasters, American Broadcasting Companies, Inc., the Television Network Affiliates Association, Television Licensees, Association of Maximum Service Telecasters, Inc., Manufacturers Radio Frequency Advisory Committee, Aerospace and Flight Test Radio Coordinating Council, Farinon Electric Operations/Harris Corporation, Association of American Railroads, Cleveland Associates Company, Buford Television, Inc., and Utilities Telecommunications Council and the Informal Objections filed by Home Box Office, Puerto Rico Mayors Association and CBS, Inc. ARE DENIED.

106. IT IS FURTHER ORDERED, That the Motion for Stay filed by the National Christian Network IS DENIED.

107. IT IS FURTHER ORDERED, That the above-captioned application of Satellite Television Corporation IS GRANTED as conditioned in this *Memorandum Opinion and Order.*[104]

108. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send by Certified Mail, Return Receipt Requested, a copy of this *Memorandum Opinion and Order* to each of the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

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[104] As stated in the introduction, this grant implies the reservation for STC of sufficient spectrum and orbital resources for the implementation of its national system as described in the instant application, subject to the Final Acts of RARC–83 and the competing needs of the other first-round applicants. This is in keeping with our determination as to the best manner in which to manage the development of the various systems through grant of individual construction permits. This reservation puts STC on an equal footing with the other first-round applications now under consideration. In compliance with paragraph 115 of the *Report and Order* and Section 308 of the Communications Act, STC has provided sufficient information for us to consider and approve the proposed national system. This approval, however, does not include Commission authorization for financing of subsequent phases of the STC national system. This *Order* only authorizes Comsat's $225 million equity contribution and its guarantee of STC's $400 million line of credit. All future applications for construction permits must include full financial information including the expected impact on Comsat's INTELSAT/INMARSAT responsibilities.

Appendix

COMSAT
Projected Changes in Financial Position
for Period 1981–1986
(In Millions)

SOURCE: Paragraph 45, Memorandum Opinion & Order unless otherwise indicated.

| | | |
|---|---|---|
| RESOURCES PROVIDED BY: | | |
| Operations | $550 | |
| Borrowing[105] (unutilized capacity) | 100[106] | |
| Treasury Stock Reissue | 100 | |
| Total | | $750[107] |
| RESOURCES COMMITTED FOR: | | |
| INTELSAT/INMARSAT operations | $300 | |
| Dividends Payable | 100 | |
| STC Stock Purchase | 225 | |
| Total | | $625 |
| Resources in excess of commitments | | $125 |

*Comments*

1. Average resources in excess of commitments equals $25 million per year.
2. In the past year, Comsat has twice requested expedited financing authorization to cover unanticipated expenses totalling $100 million (including a $15 million "buffer"). See para. 45, note. 43. It could be argued that these were extraordinary circumstances.

CONCURRING STATEMENT OF FCC COMMISSIONER JAMES H. QUELLO

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[105] Comsat "can safely borrow up to $200 million." Para. 45. See also *Comsat Request to Acquire Debt Financing*, 88 FCC 2d 931, 933 (1982). This debt capacity would give Comsat (unconsolidated) a "safe" 30% debt to total capitalization ratio [*i.e.*, $\frac{\$200}{\$500 + \$200}$]. See para. 45, note 43.

However, a Comsat debt of $200 million combined with the proposed STC debt of $400 million (para. 12) would result in Comsat's consolidated debt ratio of approximately 55%

[*i.e.*, $\frac{\$200 \text{ (Comsat debt)} + \$400 \text{ (STC debt)}}{\$500 \text{ (external Comsat equity)} + \$600 \text{ (Comsat \& STC debt)}}$].

[106] Comsat has already utilized $100 million of its $200 million "safe" debt capacity. *See Comsat Request to Acquire Debt Financing*, _____ FCC 2d _____ (1982), FCC 82-419, released September 24, 1982, and *Comsat Request to Acquire Debt Financing*, 88 FCC 2d 931 (1982).

[107] Plus an indeterminate amount of funding *if* Comsat elected and were able to issue additional equity.

IN RE: APPLICATION OF SATELLITE TELEVISION CORPORATION FOR A CONSTRUCTION PERMIT IN THE DIRECT BROADCAST SATELLITE SERVICE

I have a continuing concern about the potential adverse impact Direct Broadcast Satellite programming may have on local broadcast service.[108] Nevertheless, this new technology may offer substantial benefits to American viewers, and I concur in this authorization.

DISSENTING STATEMENT
OF
COMMISSIONER ANNE P. JONES

IN RE: APPLICATION OF SATELLITE TELEVISION CORPORATION FOR A CONSTRUCTION PERMIT IN THE DIRECT BROADCAST SATELLITE SERVICE.

In my view the threat which COMSAT's proposed entry into the direct satellite broadcasting business poses to its statutory INTELSAT/INMARSAT mission clearly outweighs any public interest benefit such entry is likely to provide.

As to benefit, I note that there is no dearth of other applicants seeking to enter this proposed new business. Eight have already filed applications which have been accepted and are being processed. I therefore see no reason to assume that COMSAT's entry into this business is necessary to ensure prompt and adequate provision of DBS service to the American public.

As to threat, I note that this venture will involve an enormous investment by COMSAT in a high risk business in which it has no special competence. It seems to me entirely possible that despite its optimistic forecasts and expectations, COMSAT will, figuratively speaking, lose its shirt in this venture. If that occurs, or at some point seems about to occur, the effect on COMSAT's statutory mission will, in my judgment, almost inevitably be substantial and adverse.

I understand and applaud the structural safeguards and regulatory mechanisms relied on by the majority in approving this application. They express confidence that with these safeguards and mechanisms, the Commission will be able to prevent COMSAT from cross-subsidizing this venture and protect it from any impairment of ability to raise capital for its INTELSAT/INMARSAT requirements as a result of the venture. I do not share that confidence. And in any event, in light of the number of other aspiring DBS operators, I believe it is a misuse of scarce Commission resources to commit them to the almost certainly futile job of policing compliance with these safeguards and mechanisms.

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[108] *See Report and Order*, 47 Fed. Reg. 31553 (July 21, 1982) (concurring opinion).

I therefore respectfully dissent.

## Concurring Statement of Commissioner Henry M. Rivera

In the Matter of: Application of Satellite Television Corporation for Authority to Construct an Experimental Direct Broadcast Satellite System

Last month, in the *Comsat Structure* order,[109] we reaffirmed that Comsat, consistent with the 1962 Satellite Act, may engage in activities that *do not hinder or interfere* with its INTELSAT/INMARSAT mission. Thus, in order to approve the instant application, we must conclude that the proposed STC venture will not jeopardize Comsat's financial ability to discharge that basic mission. The majority unequivocally concludes that the STC venture will not threaten Comsat's INTELSAT/INMARSAT obligations. *See* MO&O para. 45. Based on my own analysis[110] I do not share this certitude. This issue here is extremely close—almost too close. However, the impact of the STC proposal (as presently configured) on Comsat is not unquestionably negative. And obviously, Comsat is not bent on "financial suicide." For these reasons, I do not feel it necessary to override Comsat's judgment in this instance.[111]

I would have preferred that this Memorandum Opinion and Order contain a more realistic assessment of STC's financial plan. Such an approach would have indicated the financial boundaries beyond which the Commission would be unlikely to go when reviewing Comsat's future ventures. A more forthright appraisal would also have served to make clear to Comsat that the type of authorization allowed here is not a matter of course.

Finally, I find little comfort in the "safeguard" requiring STC to exhaust all external sources of capital before requesting Commission approval for additional financing from Comsat.[112] Should STC be unable to obtain from external resources all the capital it may need, I would not be shocked if, as twice earlier this year, Comsat sought additional funding authorizations from us claiming the existence of an "emergency" situation. In that event, I would be prepared to deny Comsat's request, if the circumstances warrant it, no matter how Draconian the impact.

Realistically, I concur.

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[109] 90 FCC 2d 1159 (1982), FCC 82–372, released August 13, 1982.

[110] Contained, for the interested, in the Appendix to this Statement.

[111] I am not addressing the competitive viability of the STC proposal.

[112] See paras. 47–48 and 107, note 104.

CATV Interference
Forfeiture Notice of Apparent Liability

Commission issued Notice of Apparent Liability for violation of its cable television signal leakage standard as well as for the cable system's failure to correct harmful interference to another licensed service.
—*Sonic Cable TV*

FCC 82–440

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

| In re: | |
|---|---|
| SONIC CABLE TV | |
| Grover City, California | CA0032 |
| Arroyo Grande, California | CA0026 |
| Pismo Beach, California | CA0038 |

NOTICE OF APPARENT LIABILITY

Adopted: October 6, 1982; Released: October 15, 1982

BY THE COMMISSION:

1. This is a Notice of Apparent Liability for forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80(f) of the Commission's Rules.

2. Sonic Cable TV's cable television system serving the above-referenced communities has incurred liability in the total amount of $6,000.00 based on the following willful and/or repeated violations of the Communications Act of 1934, as amended, and the Commission's Rules:

(1) Emission of radiation in excess of 20 microvolts per meter measured at ten feet on January 25, 27, and July 7, 8, 1982, as described herein in violation of Section 76.605(a)(12) of the Commission's Rules. ($2,000 forfeiture)

(2) Failure to correct harmful interference to a radio communications service, as described herein on January 28 and June 29, 1982, in violation of Section 76.613(b) of the Commission's Rules. ($4,000 forfeiture)

3. On October 14, 1981, the Commission's Field Office at Long Beach, California, sent Sonic Cable TV a letter of inquiry requesting that it respond to a complaint filed by a local amateur radio operator, Mr. Richard Helzer, who resides at 2830 Halcyon Road, Arroyo Grande, California. In his letter of complaint, Mr. Helzer alleged that Sonic's cable system was interfering with his amateur radio communications on certain frequencies in the two meter band (144–148 MHz). By letter dated November 6, 1981, Sonic responded to the Commission's letter of inquiry. In its response, Sonic stated that it had conducted signal leakage measurements in the area of Mr. Helzer's home and with one exception found that the measured levels did not exceed the Commission's standard of 20 microvolts per meter measured at 10 feet, as set forth in Section 76.605(a)(12) of the Commission's Rules. In regard to the one leak found to be in excess of the Commission's radiation standard, Sonic indicated that it had been corrected. Sonic's response did not address the issue of interference.

4. Subsequent to Sonic's November 6, 1981, reply, the Commission's Long Beach Field Office received several complaint letters from amateur radio licensees complaining of harmful interference to their communications allegedly caused by Sonic's excessive radiation leakage. Additoinally, in a letter to the Chief of the Cable Television Bureau's Enforcement Division, dated November 30, 1981, Mr. Helzer informed the Commission that the harmful interference he had complained of was still present after Sonic's attempts to resolve the problem. In view of Mr. Helzer's rebuttal letter and because of numerous other complaints of harmful interference filed by local amateur radio operators on December 31, 1981, the Commission wrote Sonic asking that it respond in detail to the allegations of harmful interference and excessive radiation caused by its cable system. In the Commission's letter, Sonic was reminded that it had two separate and distinct obligations under the Commission's Rules: to eliminate the presence of harmful interference to local amateurs caused by the operation of its system as well as to comply with the Commission's radiation standards for cable systems. In regard to its obligation of eliminating harmful interference, it was pointed out that Section 76.613 of the Commission's Rules defines harmful interference to a non-safety of life service as any emission, radiation or induction which seriously degrades, obstructs or repeatedly interrupts a radio communication operating in accordance with Commission requirements. The letter further emphasized that the obligation to remedy harmful interference is independent of the Commission's excessive radiation criteria and that compliance with the Commission's radiation standards is not sufficient in the face of continuing interference problems.

5. On January 25–28, 1982, the Commission's Long Beach, California, Field Office conducted an inspection of Sonic's above-captioned cable

system. During that inspection, the Commission's engineers found Sonic's system to be radiating in excess of the Commission's standards of 20 microvolts per meter measured at 10 feet as set out in Section 76.605(a)(12) of the Commission's Rules. On January 25, 1982, the Commission's engineers found excess radiation at a point near 631 Bayview Lane, Arroyo Grande, California, on two frequencies in the amateur radio two meter band: 145.25 and 147.45 MHz. On January 27, the Commission's engineers found excessive radiation leakage on 145.25 MHz at a point near 1199 Linda Drive, Arroyo Grande, and 1072 Ritchie Road, Grover City, California. All of the above communities are served by Sonic's cable system.

6. On January 28, 1982, Commission engineers visited Mr. Helzer's residence to determine whether his amateur radio communications were being harmfully interfered with by Sonic's cable system. During this process, the Commission's engineers checked their January 25, 1978 findings of Sonic's excessive radiation leakage within the two meter amateur band, 145.25 and 147.45 MHZ, and concluded that Sonic's cable system was still radiating excessively on those two frequencies near Mr. Helzer's home. At Mr. Helzer's home, the Commission's engineers personally observed harmful interference to Mr. Helzer's two meter amateur radio receiver. The interference to Mr. Helzer's communications could not be removed by turning up the "squelch" control on his receiver.

7. On February 2, 1982, Sonic was issued a Notice of Violation informing it of the excessive radiation found on its cable system. Sonic responded by letter dated February 11, 1982, stating that the subject leaks had been corrected. Sonic also informed the Commission that it had established a program for continually monitoring its cable system for instances of excessive radiation leakage.

8. By letter dated February 22, 1982, Sonic responsed to the Commission's December 31, 1981 inquiry. Sonic stated that the instances of excessive radiation brought to its attention had been corrected. Also, it again informed the Commission that it had instituted a program to detect excessive radiation. Furthermore, Sonic stated that it had contacted those amateur radio operators located in its service area which had complained of harmful interference, and it had replaced various parts of its distribution system near their homes in an attempt to resolve the interference problem. Moreover, Sonic maintained that it would deal with interference problems on a priority basis.

9. As a result of continuing complaints by amateur radio operators located in areas served by Sonic, the Commission's Long Beach Field Office on June 29 to July 8, 1982, conducted a second on-site investigation of Sonic's above-referenced cable system. During this inspection, Commission engineers on June 29, 1982, again visited Mr. Helzer's residence to investigate his continued complaints of harmful interference in the two

meter amateur band. To determine whether the interference Mr. Helzer was experiencing in the two meter band was attributable to Sonic's operation, the Commission's engineers had Mr. Helzer contact another amateur radio operator on frequencies in the two meter band not used by Sonic to observe whether he could freely communicate. Mr. Helzer was readily able to communicate on these "clear" frequencies. However, when Mr. Helzer attempted to communicate on 145.27 MHz, a frequency in the two meter band used by Sonic, all that could be heard by the Commission's engineers was Sonic's signal and the other amateur signal "beating" against one another. The Commission's engineers therefore concluded that Mr. Helzer was unable to communicate with the other amateur operator as a result of the harmful interference caused by Sonic's cable system.

10. On July 7, 1982, the Commission's engineers conducted an inspection at the rear of Mr. Helzer's backyard and they found Sonic's system radiating in excess of the Commission's standards on 145.27 MHz. On July 8, 1982, the Commission's engineers reconfirmed the presence of radiation in excess of the Commission's permissible standard on 145.27 MHz near Mr. Helzer's residence originating from Sonic's cable television system.

11. Under the Commission's regulatory framework, a cable system's use of spectrum is dependent upon its ability to maintain signal leakage integrity. Cable systems employ closed coaxial cable delivery systems which are not intended to radiate frequencies over the air. Thus, cable television systems and authorized over-the-air users may use the same frequencies in the same areas. However, to facilitate shared use, cable systems must meet stringent Commission radiation standards to insure that their use of the same frequencies via coaxial cable will not interfere with co-located over-the-air licensed services. Thus, Section 76.605(a)(12) of the Commission's Rules prohibits cable systems, such as Sonic's, which operate in the 54–216 MHz band from radiating in excess of 20 microvolts per meter mesured at 10 feet. Furthermore, even if a cable system meets the above radiation leakage standard, should its operation cause harmful interference, Section 76.613 of the Commission's Rules requires that the harmful interference be eliminated.

12. Based upon the above facts, it has been found that Sonic's cable system has been radiating in excess of the Commission's standard as well as causing harmful interference in the amateur radio two meter band. Both of these violations threaten the Commission's regulatory goal of compatibility between the shared use of frequencies by cable systems and various co-located over-the-air licensed services. For this reason, the Commission views Sonic's violations with great concern. Consequently, after considering all the facts and circumstances in this matter, we conclude that Sonic's violations warrant the imposition of a forfeiture totalling six thousand dollars.

In regard to this forfeiture, you may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment hereto.

The Secretary is directed to issue this Notice of Apparent Liability by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

Ashbacker Doctrine
Common Carrier, Mobile Radio
Domestic Public Land Mobile Radio Service, Need For

Commission held that failure to demonstrate need for a two-way DPLMRS channel pursuant to interim need standards is grounds for denying application without hearing. Applicant not denied *Ashbacker* rights to comparative hearing because its application was properly dismissed as unacceptable for filing. The substantially complete test does not apply to DPLMRS applications.
—*Tel-Page Corporation*

FCC 82–448

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

| | |
|---|---|
| In re Application of<br><br>TEL-PAGE CORPORATION<br><br>For a construction permit to operate Domestic Public Land Mobile Radio Service Station KEJ894 on frequency 152.03 at Rochester, NY. | File No. 20460–CD–P–(1)–82 |

MEMORANDUM OPINION AND ORDER

Adopted October 13, 1982
Released October 18, 1982

BY THE COMMISSION:

1. Presently before the Commission is an application for review filed by Tel-Page Corporation (Tel-Page) of the action of the Chief, Common Carrier Bureau, under delegated authority, returning as defective the captioned Tel-Page application for authority to construct and operate an additional facility for Domestic Public Land Mobile Service Station KEJ894 at Rochester, New York.[1] The Bureau found that Tel-Page had

[1] In a Memorandum Opinion and Order, Mimeo No. 4624, released June 17, 1982, the Chief, Common Carrier Bureau denied Tel-Page's petition for reconsideration of the Mobile Services Division's action returning the application.

not demonstrated public need for an additional frequency under the interim standards adopted in the Commission's *Further Notice of Proposed Rulemaking* in Docket 20870, 84 FCC 2d 857 (1981). For the reasons indicated below, we will deny Tel-Page's application for review.

2. In its application for review, Tel-Page reiterates the arguments made in its petition for reconsideration. Tel-Page admits that it has not demonstrated public need for an additional frequency in accordance with the grade of service standards set forth in Docket 20870, but argues that the Bureau should have designated its application for hearing instead of returning it as defective. According to Tel-Page, a content defect for which an application may be returned is different from a failure to comply with the standards of processing policy such as the Docket 20870 interim standards, because the former concerns acceptability for filing while the latter establishes acceptability for grant of an application. In this case Tel-Page argues that the interim standards adopted in Docket No. 20870 do not create threshold requirements of acceptability for filing applications, but rather set forth criteria for grant. Tel-Page asserts that, until this dismissal, if a grade of service showing did not justify an additional channel, an application was not returned as defective but was designated for hearing.

3. Next, Tel-Page contends that even if Docket 20870 interim standards created a threshold for acceptability of an application, the Common Carrier Bureau has not consistently adhered to them. Tel-Page cites numerous Common Carrier decisions which designated applications for hearing where the applicant failed to demonstrate sufficient need for a channel. Although those decisions involved applications filed prior to the effective date of the interim standards, Tel-Page argues that they are still controlling because the interim standards merely formalized existing procedures concerning need showing. Tel-Page argues that in view of the inconsistent treatment of dismissing its application while designating others for hearing, the Bureau decision should be reversed under the fairness test in *Melody Music, Inc. v. FCC*, 345 F. 2d 730 (D.C. Cir. 1965). Tel-Page maintains that the June 1, 1981, effective date of the interim standards is "a distinction without a difference" since in all cases the identical channel loading standard was applied. Also, Tel-Page cites two recent cases designating paging applications for hearing for failing to include adequate loading studies. According to Tel-Page, the paging versus two-way distinction is of no decisional consequence under *Melody Music*, and, therefore the Bureau has improperly engaged in inconsistent contemporaneous decisionmaking.

4. Lastly, because its application was returned without notice that the Docket 20870 standards were a content requirement, Tel-Page argues that it has been denied its *Ashbacker* rights[2] to a comparative hearing.[3]

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[2] *See* Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945).

[3] If Tel-Page's application was not defective and had not been returned, it would have been entitled to

*Discussion*

5. We have thoroughly considered Tel-Page's arguments, and we find them without merit. It is uncontroverted that Tel-Page, in its application, failed to demonstrate need for an additional channel under the interim standards adopted by the Commission in Docket 20870. Because it failed to demonstrate need for the channel under the interim standards, its application did not comply with the Commission's requirements and, therefore, was subject to dismissal pursuant to Section 22.20(a)(2) of the Commission's Rules.[4] As the Bureau indicated in denying reconsideration, the primary reason for adopting standards was to inform the public of the criteria for demonstrating need for an additional two-way channel. Because no standard had been previously published, the Commission designated for hearing those two-way applications which failed to adequately demonstrate need for an additional channel. As the Bureau Chief indicated in the reconsideration decision, the formal adoption of interim standards in Docket 20870 would have been meaningless, if we continued to designate for hearing applications that contained insufficient need showings. Since the effective date of the standards, June 1, 1981, the staff has routinely returned as defective two-way applications that failed to demonstrate need for an additional channel in accordance with these standards. Contrary to Tel-Page's assertions, failure to demonstrate need for an additional two-way channel is a blatant defect justifying return of the application.

6. Equally without merit is Tel-Page's contention that the Bureau's dismissal, when compared to cases designating one-way applications on need issues, constitutes inconsistent contemporaneous decisionmaking in violation of the fairness requirements enunciated in *Melody Music*. The fact that the Commission designated for hearing, instead of dismissing, one-way applications that fail to demonstrate need is not unfair to applicants for additional two-way channels because one-way and two-way services are different. Since we have neither adopted interim nor permanent need standards for one-way applications, we are designating for hearing those one-way applications which do not conclusively demon-

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a comparative hearing with an application filed by Anton Dotschal d/b/a Advanced Security Engineering (File No. 20215–CD–P–(1)–82).

[4] Section 22.20(a)(2) states in pertinent part:

> 22.20 Defective applications.
>
> (a) Unless the Commission shall otherwise permit, an application will be unacceptable for filing and will be returned to the applicant with a brief statement as to the omissions or discrepancies if:
>
> . . .
>
> (2) The application does not substantially comply with the Commission's rules, regulations, specific requests for additional information, or other requirements.

strate need but which do contain a *prima facie* showing of need. One-way applications which contain no showing of need at all are dismissed.

7. Likewise, we reject Tel-Page's contention that it has been unfairly deprived of its *Ashbacker* rights to a comparative hearing. Plainly, an administrative agency may establish, without violating *Ashbacker*, particularized application standards which bar at the outset applicants who clearly fail to meet those standards. *See United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), and *Federal Power Commission v. Texaco, Inc.*, 377 U.S. 33 (1964). Thus, because Tel-Page's application patently fails to meet the need standards established by the Commission pursuant to rulemaking, and Tel-Page has not offered any reason why those requirements should not apply in its case, its appliction need not be designated for hearing.[5] *See Hubbard Broadcasting, Inc.*, 71 FCC 2d 591 (1979); *WISE-TV, Inc.* 33 FCC 2d 675 (1972); *Springfield Television Broadcasting Corp.*, 34 FCC 2d 830 (1972); and *Radio Americana, Inc.*, Mimeo 62647, released February 15, 1965 (4 RR 2d 441 (1965)). Although the argument was not made explicitly, it appears that Tel-Page also believes that its application was "substantially complete" and should have been entitled to comparative consideration under *James River Broadcasting Corp. v. FCC*, 399 F. 2d 581 (D.C. Cir. 1968). At the outset, we note that our return of Tel-Page's application is not based upon factors relating to the completness of its application, but rather is based upon the applicant's patent failure to meet our clear, substantive requirements for grant. Moreover, as indicated by the Common Carrier Bureau in *Allen C. Moore d/b/a Moore's Service* 86 FCC 2d 787 (1981), the Commission, by rulemaking,[6] changed the cut-off standard from "substantially complete" to "acceptable for filing," thereby rendering the *James River* decision inapplicable to applicants in the mobile services area. Where, as here, a defect is overlooked at prescreening and not cured by amendment, and

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[5] Tel-Page asserts that, at the time it filed its application, it believed its failure to meet the Commission's need standards was merely a matter which could be explored at hearing and was not the sort of defect which would subject its application to dismissal or denial at the outset. However, any confusion on Tel-Page's part concerning the effect of the deficiencies in its application was dispelled when the Commission returned its application as patently defective. although it had ample opportunity, Tel-Page never sought to timely amend its application by submitting an adequate load study or justify a grant of its application despite its noncompliance with the need standard. Tel-Page asserts that if its application were designated for hearing, it could request permission from the Administrative Law Judge to supplement its need showing. We do not believe, however, that the Commission must expend its scarce resources proceeding towards a hearing on a clearly defective application, merely because the applicant may, at some future date, attempt to make the requisite need showing which it was unable to proffer upon tender of the application. The purpose of a hearing is to resolve disputed questions of fact. There is no requirement for a hearing where, as is the case here, all the material facts are undisputed and it is plain that an application patently violates the Commission's valid, substantive requirements for grant. In these circumstances, a hearing would only delay the initiation of service without any counterveiling public interest benefits.

[6] *See* Domestic Public Radio Services, Docket 19905, 44 FCC 2d 556, 557–558, n. 3 (1973) and Domestic Public Land Mobile Radio Service, Docket 19905, 60 FCC 2d 549, 552 (1976).

the defect is discovered subsequently during processing, the application will be returned as unacceptable for filing.[7] Because Tel-Page's application was defective under the Commission's Rules, it was not entitled to comparative consideration, and the application was properly returned.

8. In view of the foregoing, we affirm the Bureau's denial of Tel-Page's petition for reconsideration.

9. Accordingly, IT IS ORDERED That the Application for Review filed by Tel-Page Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

[7] *Allen C. Moore, supra*, at n. 16. Subsections 22.20(a) and (c)(1) of the Rules require that, unless accompanied by a request which sets forth the reasons in support of a waiver, an application not in compliance with the Commission's rules will be returned as unacceptable for filing.

Cross Ownership
Multiple
Review by Review Board
Satellite Station, Television
Transmission First Local

Review Board reversed Initial Decision, granted UHF television construction permit to common owner of AM station in same community, and denied competing application for a satellite television station. Grantee will provide first local full service TV station and thus obviates necessity for competing satellite proposal.
—*TV–8, Inc.*
BC Docket No. 80–454

FCC 82R–52

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

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| In re Applications of | |
| TV–8, INC.<br>Somerset, Kentucky | BC DOCKET<br>No. 80–454<br>File No. BPCT–<br>780720IA |
| BLUEGRASS MEDIA, INC.<br>Somerset, Kentucky | BC DOCKET<br>No.80–455<br>File No. BPCT–<br>790507KM |
| For Construction Permit for a New Television Station | |

APPEARANCES

*Robert S. Stone* and *Rudolph L. Ennis*, on behalf of TV–8, Inc.; *Victor E. Ferrall, Jr.* and *Linda K. Smith*, on behalf of Bluegrass Media, Inc.; *Allan Moskowitz* and *Charles W. Kelley*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

Adopted: September 8, 1982; Released: September 14, 1982.

BOARD CHAIRMAN MARINO FOR THE REVIEW BOARD:

1. In this case both broadcast applicants propose to provide UHF television service to Somerset, Kentucky. Somerset is a small community in an economically poor area, para. 8, below. In order to provide television service TV–8, Inc. will rely for some support on its commonly owned radio station WTLO(AM), Somerset, while Bluegrass Media will largely duplicate the television programs of commonly owned television station WBKO, Bowling Green, Kentucky located in the same region. The basic question presented is which proposal will best serve the needs of the community of Somerset. After considering the written and oral arguments, the Review Board agrees with the Broadcast Bureau that a grant of TV–8's proposal to provide full scale local television service is more consistent with well settled Commission policy than a grant of Bluegrass' "satellite" service which will duplicate existing programs and offer only a very limited amount of local service to Somerset.

2. *Background.* The Hearing Designation Order, Mimeo 35945, released September 18, 1980, specified issues to determine (1) whether common ownership, operation, or control of Station WTLO(AM) and TV–8's proposed station would be in the public interest, (2) whether circumstances exist which would necessitate the proposed satellite operation of Bluegrass, and (3) which applicant would better serve the public interest on a comparative basis. In an Initial Decision released March 8, 1982 (FCC 82D–13), presiding Administrative Law Judge (ALJ) Kuhlmann found that the public interest would not be served by the common ownership of Station WTLO(AM) and the proposed TV–8 television station, and that the proposed "satellite" operation of Bluegrass was needed. He therefore denied the TV–8 application and granted that of Bluegrass. The proceeding is now before the Review Board on exceptions filed by TV–8 and the Broadcast Bureau on April 19, replies filed May 17, the oral argument held June 24, 1982, and our examination of the record. The findings of fact in the Initial Decision are adopted, except as modified below, but we reverse the denial of TV–8 on the common ownership issue, find no necessity for the proposed satellite operation of Bluegrass, and conclude that a grant of the TV–8 application will better serve the public interest, convenience, and necessity.

3. *Common Ownership: Contentions.* The proposed TV–8 station and existing Station WTLO(AM) in Somerset are commonly owned and controlled, because four persons control 100% of the stock of WTLO and 70% of the stock of TV–8. I.D., para. 3. Specifically, the licensee of WTLO, Cumberland Communications, Inc., has four stockholders, each of whom has a 25% ownership interest in that station. These owners are James A. Brown, T. B. Grisson, Jr., H. Rakestraw, Jr., and E. R. Taylor. While Brown is a 16% shareholder of TV–8, Grissom, Rakestraw, and Taylor

each own 33 1/3% of the stock of Burnside CATV Corp. which, in turn, has a 54% ownership interest in TV–8. *Id.*

4. To justify its proposal, TV–8 sought to demonstrate that joint operation of proposed Channel 16 and WTLO(AM) would result in economies that would not be achieved in separate operation of the two facilities and that are essential for the development of a local UHF television station in the Somerset market. These proposed economies include savings in rent and programming services; shared staff, facilities, equipment, sales, and promotional and management expertise; and the use of WTLO(AM) profits to subsidize the TV operation. I.D., paras. 6–29. These proposed economies were insufficient, the ALJ found, and he concluded therefore that TV–8 failed to establish that its common control and operation of UHF Channel 16 and WTLO(AM) would serve the public interest. I.D., paras. 61–69, 87.

5. In its exceptions, TV–8 urges, based on the evidence presented concerning the economies of joint operation, that common operation and control of WTLO(AM) and the proposed TV–8 television station would serve the public interest. The Broadcast Bureau urges that TV–8 should have been found qualified, regardless of whether any economies from joint operation exist, because TV–8 proposes to provide a first local television station in a situation in which no other full service applicant would be expected to apply. In its reply, Bluegrass supports the ALJ and urges that TV–8 failed to establish that common ownership is justified in this case.

6. *Discussion.* In Section 73.636(a)(1) of the Rules, 47 CFR 73.636(a)(1), the Commission prohibits the grant of a television construction permit to an applicant that already owns, operates, or controls an AM broadcast stationin the proposed community of license. However, Note 8 to this rule provides that applications for UHF television stations "will be handled on a case-by-case basis in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest."

7. Based on the record in this case, the Board finds that the proposed TV–8 cross-ownership will serve the public interest because TV–8 will provide a first local full service television station to Somerset and will promote the policy favoring UHF development by providing a first UHF television station to that market. The Commission recently reaffirmed its long-standing concern with fostering the development of new full-fledged UHF stations competitive with other local television stations in the same market. *See Improvements to UHF Television Reception,* FCC 82–333, released August 6, 1982; *VHF TV Top 100 Market,* 81 FCC 2d 233, 240–47, (1980), and cases cited therein. In spite of some recent improvements in the plight of UHF stations, the Commission just five months ago determined that continuation of the Note 8 exception remains an important

part of its policy encouraging the development of new full scale UHF stations. *Multiple Owernship Rules*, 51 RR 2d 401 (1982). Therefore, the Bureau is correct when it states that the Commission, in numerous Note 8 cases, has permitted cross ownership where a new media voice would be provided that would not otherwise be present in the market or where the new UHF station would provide a first local television service where no other applicant would be expected to apply. *Notice of Proposed Rule-Making*, Appendix, pp. 5–6, FCC 79–537, released September 24, 1979, 44 Fed. Reg. 55603; *Television Corp. of Virginia*, 69 FCC 2d 1161, 43 RR 2d 231 (1978); *Wilton E. Hall*, 68 FCC 2d 642, 43 RR 2d 91 (1978); *Windmill Broadcasting Co.*, 44 RR 2d 475 (1978). These factors which are present in this case establish the public's interest in TV–8's proposal.

8. The record in this case also establishes that Somerset, a community of 16,000, is an economically-poor area that will be "one of the smallest television 'markets' in the United States." It is currently served by an AM-FM combination and a noncommercial FM station, in addition to the daytime-only Station WTLO(AM) that is controlled by the TV–8 stockholders, and by a noncommercial TV station located in northern Pulaski County. I.D., paras. 32–33; Tr. 84. In addition, nearly 90% of the homes in the Somerset area receive service from cable television. TR. 442. Although Channel 16 was assigned to Somerset in 1966, no application for a full service UHF station was filed until TV–8's application in 1978. Tr. 44, 194, 230. In our judgment, these facts make it unlikely that an applicant not proposing common ownership will soon offer to establish a full service station there or that a grant of TV–8's application will create undue concentration in the Somerset market.

9. While these factors are sufficient to establish that TV–8's proposal is in the public interest, we also note that TV–8 has shown some economies of operation can be expected to result from the proposed cross-ownership. TV–8 plans to house its offices and studios in the same building where the WTLO(AM) offices and studios are located. That building is owned by the same four principals who control the radio station. I.D., para 4. We agree with TV–8 that this co-location of studios will result in potential cost reduction by making available studio facilities for a reasonable rent, thus avoiding the necessity of higher capital expenditures to buy real estate and construct a studio, and by facilitating the planned sharing of certain staff. Tr. 265–6, 411–25, 431; TV–8 Exh. 2, p. 3. And the common owners will be in a position, if they choose, to increase these economies by adjusting the rent charged to TV–8 and by further combining the function of the radio and television staffs. These anticipated savings, although small, are real and will improve the potential viability of the proposed UHF station. In *Multiple Ownership Rules*, *supra*, 51 RR 2d at 404 (1982), the Commission emphasized that economies of joint operation can improve consumer welfare and that such economies may also improve the

prospects for viability of combined operations. *See also Central Broadcasting Co., Inc.*, 28 FCC 2d 229, 21 RR 2d 482 (1971). In sum, it is sufficient here that TV–8 offers a first local full service television station in an area where no other applicant appears likely to do so and that the cross-ownership proposed is likely to aid the development of the UHF station. *Combined Communications Corp.*, 28 FCC 2d 16, 21 RR 2d 441 (1970). The advantages of service from a new station that might not otherwise be present outweigh the concerns embodied in the multiple ownership rules. We therefore find that the proposed TV–8 common ownership will serve the public interest.

10. *Necessity for Satellite: Contentions.* Bluegrass proposes to operate its television station as a satellite of its network affiliated full service Station WBKO at Bowling Green, Kentucky. That is, it will carry the same programs as the Bowling Green station except that, initially, it will provide a nightly half hour of local Somerset news and a monthly local public affairs program. Bluegrass intends to increase the amount of its locally originated programming as the station develops. I.D., paras. 30–31. Somerset is a small economically-depressed community which already has three commercial radio stations and a heavy cable television penetration, para. 8 above. Bluegrass provided an economic study to support its view that an independent full service television station would probably not be viable in Somerset and that a network affiliated station would probably be only marginal. I.D., paras. 46–48. Largely because of the poor economic setting in Somerset and the risk involved in establishing a full service UHF television station there, the ALJ consequently found that there is a need for Bluegrass' proposed satellite station (I.D., paras. 72–73). Nevertheless, Bluegrass was recommended for only a two-year initial license term because of rapid changes occurring in UHF development that may make it easier to develop a full service station in Somerset in the future. I.D., para. 82. In its exceptions, TV–8 argues that the Bluegrass application should have been denied because the TV–8 proposal of a full service station obviates any necessity for the satellite station proposed by Bluegrass. The Bureau supports this point of view. Bluegrass replies that it has proved the necessity for satellite operation.

11. *Discussion:* Bluegrass has not satisfied the specific test applied to an applicant seeking to establish a satellite operation. First and foremost, a television satellite station is a creature of *necessity*, "created to provide television service to small communities and/or sparsely settled areas which are economically incapable of supporting their own local television station." *Central California Communications Corp.*, 47 FCC 2d 1001, 1002, 30 RR 2d 1380, 1382 (1974). In general, satellite stations rebroadcast or duplicate programming of a parent station licensed to another community and are authorized by the Commission only in "the hope that the satellite would someday become a full scale local television station" that

will offer programming designed to serve the needs and interests of the community of license. *Id.* Therefore, an applicant proposing satellite operation must establish the "necessity" for such station and make a specific showing of how and why the operation is necessary for the proposed community. *Multiple Ownership Rules,* 3 RR 2d 1554, 1563 (1964); *Newhouse Broadcasting Corp.*, 77 FCC 2d 97, 48 RR 1 (1980). Necessity is defined as "something indispensable"; of "certain and unavoidable character or quality. . ." Webster's New International Dictionary (2nd Ed.). We agree with the Bureau that the required showing has not been made in this case. Somerset is a very small potential television-market and the establishment of a full service station there would of course entail some risk. Were Bluegrass the only applicant in this proceeding or were there no full service applicant presently available or feasible for Somerset, a finding of necessity for its proposed satellite service might arguably flow from the facts in this record. *See Central California Communications Corp., supra; Meyer Broadcasting Co.*, 67 FCC 2d 593, 42 RR 2d 339 (1978). But this is not the situation before us.

12. TV–8 is a fully qualified applicant that proposes immediate full service to Somerset and we have already concluded that its proposed common ownership with WTLO is in the public interest. See paras. 7–9, above. Consequently, the community of Somerset has no present "indispensable" need for Bluegrass' proposed satellite operation nor must it rely on the "hope" that it may one day evolve into a full-service station, because it can alternatively receive immediate full service from TV–8. While satellites are permitted for economic reasons, their obvious detriment is the absence of programming locally originated at the satellite stations. *Central California Communications Corp., supra.* TV–8 which proposes a truly local outlet for Somerset, does not suffer from this deficiency. In these circumstances there is simply no necessity or compelling reason to authorize a satellite operation in that community at this time. Accordingly, Bluegrass' proposal must be denied and it is therefore unnecessary to proceed to the standard comparative issue.

13. *Summation.* UHF television stations have had difficult financial problems for some time, although conditions may be improving. See generally *Central Alabama Broadcasters, Inc.*, 88 FCC 2d 1501 (Rev. Bd. 1982). These types of stations are a major means of providing local service to as many communities as possible. But the statutory scheme devised by Congress does not assure broadcasters a reasonable return or financial success. *See FCC* v. *Sanders Bros. Radio Station,* 309 U.S. 470, 475 (1940), cited in *Central Alabama, supra,* 88 FCC 2nd at para. 43. Here, Somerset, which the applicants propose to serve, is a rather small market, and both applicants have designed proposals which they believe will maximize their chances of succeeding in the marketplace. Considering their proposals from the point of view of service to Somerset, this Board

has found that TV–8's application will better serve the public interest because of the Commission's concern with encouraging the rapid development of full service UHF stations, especially where a first local television service is contemplated. And, as the Bureau points out, no necessity for a satellite proposal has been demonstrated on this record.

14. ACCORDINGLY, IT IS ORDERED, That the Motion to Strike filed by TV–8, Inc. on May 26, 1982, IS DENIED.

15. IT IS FURTHER ORDERED, That the application of TV–8, Inc. (File No. BPCT–780720IA) for a construction permit for a new television broadcast station in Somerset, Kentucky IS GRANTED subject to the conditions in para. 6 of the Hearing Designation Order, Mimeo 35945, released September 18, 1980, and the application of Bluegrass Media, Inc. (File No. 790507KM) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

FCC 82D–13

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

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| In re Applications of | |
| TV–8, INC.<br>Somerset, Kentucky | BC Docket<br>No. 80–454<br>File No. BPCT–<br>780720IA |
| BLUEGRASS MEDIA, INC.<br>Somerset, Kentucky | BC Docket<br>No. 80–455<br>File No. BPCT–<br>790507KM |
| For Construction Permit for New Television Station | |

*Appearances*

*Robert S. Stone* and *Rudolph L. Ennis* on behalf of TV–8, Inc.; *Victor E. Ferrall, Jr.* and *Linda K. Smith* on behalf of Bluegrass Media, Inc.; *Edythe Wise* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD J. KUHLMANN

Issued: February 24, 1982; Released: March 8, 1982

1. This case was designated for hearing by the Chief, Broadcast Bureau, on September 24, 1980 (45 Fed. Reg. 63353) to consider issues 1–4 below, issue 5 was added by the presiding judge:

1. To determine whether common ownership, operation or control of Station WTLO(AM) and TV–8, Inc.'s proposed television station would be in the public interest.
2. To determine whether circumstances exist which would make operation as a "satellite" necessary for Somerset, Kentucky.
3. To determine which of the proposals would, on a comparative basis, better serve the public interest.
4. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications, if either, should be granted.

5. To determine whether TV–8, Inc.'s stockholders will guarantee the loan from the First & Farmers National Bank.

2. A prehearing conference was held on December 3, 1980, the initial case was submitted in writing and was filed on March 2, 1981, and sessions to cross-examine the written case were held March 23–25, 1981 and April 22, 1981. The record was closed on May 1, 1981, proposed findings of fact were filed by all parties on June 3, 1981, and replies were filed on June 24, 1981.

*Findings of Fact*

*I. The Proposed Common Ownership Between WTLO(AM), Somerset, Kentucky and TV–8, Inc.*

3. If a grant is made to TV–8, Inc., there would be common ownership and control between proposed television channel 16 in Somerset, Kentucky and radio broadcast station WTLO(AM) in Somerset. WTLO is licensed to Cumberland Communications, Inc. TV–8's proposed grade A contour would encompass all of Somerset, as does the primary signal contour of the existing WTLO(AM). The sole four stockholders of WTLO are stockholders or potential stockholders of TV–8: James A. Brown, vice-president and 16 percent shareholder of TV–8, holds a 25 percent interest in WTLO. T. B. Grissom, Jr., a director of TV–8, is secretary and holds a 25 percent interest in WTLO. H. Rakestraw, Jr., a director of TV–8, holds a 25 percent interest in WTLO. While Brown has a 16 percent direct stock interest in TV–8, Grissom, Taylor and Rakestraw each own 33 1/3 percent of the stock in Burnside CATV Corporation which owns 54 percent of the stock of TV–8.[1] Thus, these four persons control 100 percent of the stock of WTLO and 70 percent of the stock of TV–8. Mr. Taylor, has 50 percent voting control of Burnside CATV as both a director and shareholder. Tr. 237, 298–99, 305–07; TV–8 Exh. 1, p. 1; TV–8 Exh. 2, p. 1; TV–8 Exhs. 5 and 7.

4. Burnside CATV, WTLO(AM), and TV–8's closed circuit channel are located in Somerset in the same building as WTLO.[2] A partnership in which Taylor, Brown, Grissom and Rakestraw hold equal shares owns the WTLO building. TV–8 Exh. 1, p. 1; TV–8 Exh. 2, p. 2; and TV–8 Exhs. 5 and 7; Tr. 99–100. TV–8 proposes to locate channel 16's studio in the same building. TV–8 Exh. 1, p. 1 and TV–8 Exh. 2, p. 3; Tr. 99–100.

5. If a grant is made to TV–8, Messrs. Rakestraw, Grissom and Taylor would divest their interest in Burnside TV–8 and assign to themselves equal shares of Burnside's 54 percent interest in TV–8. TV–8 Exhs. 4, 5, and 7; Tr. 462–64.

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[1] TV–8 now provides one channel of closed circuit television programming on the two cable television systems which operate in Pulaski County; it is able to reach 8,000 subscribers. Tr. 267–68.

[2] Burnside CATV Corporation provides cable service in the communities of Ferguson and Burnside and the southern part of Pulaski County; it does not provide cable service in Somerset. Tr. 298.

6. The designation order requires that TV–8 demonstrate that its cross-ownership with WTLO(AM) would serve the public interest. TV–8 sought to demonstrate that joint operation of proposed channel 16 and WTLO(AM) would result in economies that would not be achieved in separate operation of the two facilities and that presumably cross-ownership would enhance the establishment of a new UHF station. TV–8 Exh. 1, p. 3; TV–8 Exh. 2, p. 2. TV–8's principals pointed to a number of factors. First among these was that the two stations could both occupy the building where WTLO(AM) is now located. The four owners of WTLO separately own the building and they are or will be shareholders in TV–8. However, although it is evident TV–8 will have to pay rent, TV–8 did not identify what the saving in rent would be. Tr. 182, 265–66, 348, 411–12, 416, 422, 424, 431, 427–30, 431–33; TV–8 Exh. 2, p. 3. Mr. Taylor did indicate that if radio broadcast station WTLO were sold, the building would still be available to TV–8. Tr. 348–49.

7. TV–8 urged that there would be a saving on programming services. Mr. Brown cited two services. The Associated Press news wire service, according to Brown, told TV–8 they would give the first five weeks of service free. Tr. 118. And the William B. Tanner library, Brown believes, can be obtained at a discount. Tr. 119. WTLO presently subscribes to the Associated Press national and regional news and the Tanner Library's sound effects for use as background in advertisements. Tr. 119, 120, 125. The Tanner service, if taken by both stations, Mr. Brown believes, might save $216 per year. Tr. 123–24.

8. TV–8's Brown also indicated that there would be savings through sharing WTLO's staff. The specific areas of sharing he identified were promotion, news and sports programming, and technical services and requirements. TV–8 Exh. 1, p. 3; Tr. 424.

9. WTLO has six full-time employees, although apparently full-time may mean that an employee works less than the ordinary forty hour week. Tr. 112–14. For example, WTLO's news director, Madilyn Coldiron, is considered by WTLO to be full-time even though she works only "approximately" thirty-two hours a week. Tr. 113. In addition, WTLO has six part-time employees, only one of these works more than twenty hours a week. Tr 114.

10. The employees who will be shared to do "promotional activity" would be Mr. Brown and Mr. Murphy. Tr. 115. Mr. Brown is currently the station manager, technician and engineer at WTLO. Tr. 114. Mr. Murphy works full-time at WTLO as its program director and does announcing. *Id.* Mr. Murphy is also proposed by TV–8 to be its full-time sports director. Mr. Brown indicated at one point that he would be the shared person for "technical and service requirements," although at another time in his testimony he indicated that what he would do had not been certainly determined. Tr. 86, 114. In addition, TV–8 indicated that Mr. Brown

would serve both stations by directing and supervising production personnel, which would consist of determining which, if any, WTLO employees might be available for production work for TV–8. TV–8 Exh. 1, p. 4; Tr. 89.

11. TV–8 also indicated that Mr. Brown's daughter, Kim Brown, could do custodial work for both stations. She would be paid $600 a quarter, which is four times her current salary at WTLO. Tr. 423, 434–35.

12. TV–8 does intend to share the same local news on both the radio and the TV station. Tr. 402–03. For example, in indicating that the stations would share William Hines who announces and does sports at WTLO, Mr. Brown said:

> Once his sports story is written, it can be used on television by making a carbon copy, or he may choose to make the carbon copy while he writes the story. That's, as you know, 80 percent of the job or if not, even greater than 80 percent, its probably 93 percent of the work right there, getting that story. Tr. 115–16.

In explaining "sharing" WTLO's news director, Madilyn Coldiron, Mr. Brown said:

> We will make copies of the stories that she has done and use that information on the television station. Tr. 95.

13. In fact, all potential shared employees' broadcasts would be duplicated because:

> [a] lot of their work [Messrs. Hines, Murphy, and Ms. Coldiron], as I think I explained earlier, what's done for radio . . . in good measure is done for television, such as writing a news story or a sports story or something of that nature. It can be shared by both. . . . So in some cases it would not require any extra effort at all, other than to physically take a piece of paper maybe next door or something like that. Tr. 186–87.

14. As to shared news personnel, the record is highly contradictory. Mr. Brown may or may not serve as news director of the television station (Tr. 94–95), although it was also indicated that he would "have jurisdiction" over the TV–8 news department. Tr. 94. If he does, he might direct a staff of 2 1/2 persons, consisting of a news reporter, news editor and 1/2 of someone else. Tr. 92, 95. Of these, one would be an employee of the radio station, Madilyn Coldiron. Tr. 95.[3]

15. At most four employees of WTLO(AM) would be available to be shared, in some fashion, with the proposed television station: Mr. Brown, Mr. Hines, Mr. Murphy and Ms. Coldiron. Tr. 115–16. All are working at the radio station, which is not overstaffed. Tr. 186. TV–8 has in mind that

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[3] Mr. Taylor at a later point said sales people in communities other than Somerset would cover news and make their stories available to TV–8, although they would not be shared employees or sell for the radio station. Tr. 448–52. This information was furnished on cross-examination and is not contained in either Mr. Brown's testimony or in any written proposal, application or amendment of TV–8. Tr. 451–52.

"if we are, in fact using common employees," (Tr. 88) WTLO employees could "moonlight to make a few extra bucks." Tr. 117–18.

16. No proposed shared employee of WTLO has any experience at a television broadcast station. Tr. 116. Mr. Murphy has had "on-air" experience at TV–8's closed circuit operation (Tr. 116), but it is not clear whether he is a shared employee or a full-time TV–8 employee. Tr. 117.

17. Mr. Taylor testified sharing of facilities would be an important savings. Tr. 265. Although he apparently had in mind "being in the same building" (Tr. 265), "both under the same roof" (Tr. 290), he also identified sharing "audio consoles for production at times when we are real busy" (Tr. 290); copying and office equipment (Tr. 290), and WTLO's car with a radio in it. Tr. 291. TV–8 already has an audio console used in connection with closed circuit operation (Tr. 292) and Mr. Taylor testified that he did not see a significant use for audio only in the television station. Tr. 293. The radio station's car and radio would be used to report and record a news story to be used on both the radio and television stations. Tr. 291–92.

18. Some operational matters were described as anticipated to be kept separate; editorial policy and sales staff. TV–8 Exh. 1, p. 4. Mr. Brown said that he would direct the news policy of WTLO and Mr. Taylor would be responsible for the television station. TV–8 Exh. 1, p. 4. However, on cross-examination he said that he did not direct the news policies of WTLO(AM): "We have a news person who generally determines what goes on the air and what doesn't." Tr. 88. Further, Mr. Brown also testified that he, and not Taylor, would direct the proposed television station's news staff. TV–8 Exh. 1, p. 4. TV–8's proposed separate (from WTLO) editorial policy is also difficult to reconcile with its plan to duplicate news stories (Tr. 95, 115–16, 187), and TV–8's notion that shared news staff would probably be required to do the public affairs programming at the television station under the direction of Mr. Brown. Tr. 93. Mr. Taylor ultimately seemed to indicate that there would be no separation of editorial policy. Tr. 403–04.

19. There is also a question as to the degree of separateness of the sales staffs of WTLO and TV–8's proposed station. The sales staff used by the television station in areas outside of Somerset would also do news programs for the radio station. Tr. 451. WTLO(AM)'s sales guide, tapes and sales information would be shared with the television station. Tr. 126–27. The radio station would share information with the television station about "[w]ho to avoid and who to try to see who might have a few television bucks that they are not going to spend anyplace else," (Tr. 127) and "who will advertise normally, in what media." Tr. 128.

20. Shared sales, programming, promotional and management "expertise" was also suggested as a justification for cross-ownership. TV–8 Exh. 1, p. 5; Tr. 126. Whether sales expertise will be available is questionable since time salesmen from one station are going to have nothing to do with

the time salesmen from the other. Tr. 362–63. With respect to programming "expertise," no WTLO employee has any television station experience. Tr. 116–17. Further, no radio programs will be broadcast on the television station and the programming expertise identified was knowledge of audio recording and Somerset. Tr. 128.

21. The management expert is Mr. Brown. Tr. 134. No WTLO(AM) employee (Tr. 116–17) and only one of TV–8's principals has any television experience and it is negligible. Tr. 37–40, 234, 236, 296–97. Mr. Grissom's business interests apparently relate to land and timber holdings and furniture stores; Mr. Rakestraw "is independently wealthy . . . and plays golf most of the time." Tr. 297.

22. The "promotional expertise" advantage is free advertising. TV–8 proposes to promote channel 16 on the radio station and vice versa, and pay for its advertising, as the TV–8's closed circuit operation is currently doing, by making the two advertising budgets "equal out." Tr. 128, 130–31. The exchange of advertising was characterized as "We'll spend five dollars today with you if you will spend five dollars a day with us." Tr. 131. "[C]hecks are signed in exchange." Tr. 129. "[I]t's not costing us, for us it is a reciprocal trade agreement where it is not costing dollars. We are trading checks. TV–8 will buy an exact amount of advertising from WTLO as WTLO will buy from TV–8. It gives a greater exposure in the marketplace whereas we might not be able to enjoy that relationship with the printed media for example, or our competitive radio stations in the marketplace. It broadens our exposure." Tr. 132.

23. TV–8 also sought to justify exception from Section 73.636 of the Commission's rules on the ground that combined operation of WTLO(AM) and the proposed television station is necessary because it will allow profits from the AM facility to be made available for the operation of the proposed television station. TV–8 Exh. 1, p. 2. At the same time TV–8 contended that its television station would be profitable in the first year of operation without regard to any cross-subsidization by WTLO. Tr. 364.

24. The first year operating costs for its proposed television station, according to TV–8, would be approximately $800,000 (Tr. 341), a "realistic," "inclusive" and "sufficient" figure. Tr. 341, 342.[4] TV–8 has made no cost projections beyond the first year. Tr. 342–43, 345.[5]

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[4] On an annual basis, TV–8's estimated operating costs of $480,000, projected equipment leasing expenses of $276,000, and interest on its $600,000 bank loan, without repayment of principal at $114,000 annually, would amount to $870,000. Tr. 340. This figure is reduced to $800,000 because its equipment lease might be less than the maximum loan available to it, $950,000, "in the neighborhood of $840,000" (Tr. 340), and because TV–8 might not take down the entire $600,000 loan. Tr. 341. On the other hand, inflation is going up (Tr. 340) and TV–8, anticipated taking down roughly half of the $600,000 loan in the first year of operation. Tr. 341. (TV–8 would, of course, have additional construction expenses.) Tr. 342.

[5] This is so even though Mr. Taylor understood that responsible businessmen involved in million dollar projects generally made careful estimates of projected revenues and costs for the period at least of the financing of the deal, seven or eight years. Tr. 344.

25. TV–8 projects its first year television operating revenues to approach a million dollars (TV–8 Exh. 2, p. 3; Tr. 256, 364), yielding a projected first year before tax profit on the order of $200,000. Tr. 364.

26. TV–8's projection of revenues for the television station were not based on actual performance of comparable new, small market television stations, on revenue data published by the F.C.C., on UHF television station performance, or the characteristics Somerset will have as a television market. Tr. 365–67. Earlier first year revenue projections made by TV–8 were far lower, only $325,000. Tr. 367, 368. The methodology by which TV–8 changed its revenue projections from $325,000 to approaching $1,000,000 is not used in the broadcast industry (Tr. 651–56) and is based on unsupported and unreliable rationales, relationships, multipliers and assumptions. Tr. 363, 368, 370–75, 379–81, 651–56; BG Exh. 17. For example, TV–8 estimated its broadcast television revenues by multiplying by 5 revenues obtained by TV–8 from the sale of spots and programs on its closed circuit channel (Tr. 371–73), although there is no known relationship between closed circuit and television broadcast station revenues, and no rationale for the multiplier. Tr. 651–53, 655. TV–8 also claimed it projected revenues based on operation of a cable television system closed circuit channel. Tr. 369. There is no relationship between cable revenues and broadcast revenues. Tr. 655–56. TV–8 also arrived at its $1,000,000 revenues estimate because Mr. Taylor "more or less applied the formula that the TV spots would be in the neighborhood of five times radio and the radio gross that I looked at was in excess of $200,000 and five times that puts you back in around a million dollars." Tr. 384. There is no reliable relationship between radio revenues and television revenues. Tr. 655.

27. The $1,000,000 estimate was also based on "the acceptance of the local community to advertise on such a limited outlet as a closed circuit cable channel." TV–8 Exh. 2, p. 3. In fact, for 1980 and the two preceding years, TV–8 lost money; it had negative earnings of $117,767 (BG Exh. 16; Tr. 387–88) and lost $25,281 in the period November 1, 1979 to October 31, 1980. BG Exh. 16. TV–8 also relied on unspecified anticipated growth in the community (TV–8 Exh. 2, p. 3), but the record in this regard indicates that Somerset has experienced an economic downturn. Tr. 153–56. For example, Lear Siegler, which employed 800 (18.6 percent) of the 4,300 non-agricultural, manufacturing employees in Pulaski County (Tr. 153–56) closed its Somerset plant in 1980 (Tr. 153), several retail establishments also closed (Tr. 156), and unemployment in Somerset is very high. Tr. 156, 705.

28. TV–8's subsidy claim ignored the fact that a new television station will compete directly with WTLO for the advertising dollars of its most important advertisers. Tr. 168–69, 349–51.

29. WTLO's annual revenues declined during the period 1978–80 from $216,074 to $201,552. Tr. 146–47. Its income also declined, from its record

high (in 1977) of $21,000 to $5,000 in 1980. BG Exhs. 6, 7 and 10; Tr. 147. Mr. Brown "anticipated" that WTLO's broadcast operating income would increase by at least seven percent in 1981 (TV–8 Exh. 1, p. 3; Tr. 151), but even if it did, such a given percent increase would amount to only $432. Tr. 151–52. All of the cash generated by WTLO is used to pay off its debts and there is nothing left over to contribute to the television station. Tr. 215–16; 159–162; 204–05; 245–47.

*II. The Circumstances Asserted For Operating A Satellite In Somerset, Kentucky*

30. Bluegrass Media proposes to operate channel 16 in Somerset as a semi-satellite of its network affiliated full-service television station, WBKO, channel 13, Bowling Green, Kentucky. BG Exh. 3. There is no overlap between the grade B contours of WBKO and of the proposed Somerset satellite. BG Exh. 1, p. 12. The grade B contours are separated by eleven miles. BG Exh. 1, p. 12.

31. Bluegrass will initially provide a half hour of local Somerset news on a nightly basis, using ENG origination equipment and a "Somerset Electronic Feed" (SEF) microwave network between Somerset and Bowling Green (BG Exh. 3, pp. 18–20), and a monthly local Somerset public affairs program. BG Exh. 3, pp. 19–20. It intends to increase the amount of Somerset local programming as the station develops. BG Exh. 3, pp. 19–20; Tr. 627–28. Further, WBKO, Bluegrass' Blowing Green station, is not now available in the Somerset area, either off-the-air or via cable. Tr. 320.

32. Somerset has a population of about 16,000 and during 1980–1990 househnolds are projected to grow at an average annual compunded rate of only 1.57 percent. BG Exh. 3, p. 7; Tr. 582; BG Exh. 4, Table B, n. 1. 1980 median family income in Pulaski County, the county in which Somerset is located, was $11,500, more than $4,000 below the state average. BG Exh. 3, p. 8. The 1979 average weekly wages of industrial workers in the county was $193.74, more than 15 percent below the state average. *Id.* Average yearly unemployment in Pulaski County increased more than 45 percent between 1977 and 1979. *Id.*[6] In December, 1980, unemployment in Somerset stood at 10.1 percent. *Id.* Somerset will be "one of the smallest television 'markets' in the United States . . ." BG Exh. 4, p. 3. Bowling Green, which is "significantly larger than Somerset" (BG Exh. 3, p. 6), is 204th out of the 212 television markets ranked by Arbitron. Tr. 486.

33. Commonly-owned WSFC(AM) and WSEK(FM) are located in Somerset, and provide service to Somerset. Tr. 28. Somerset is served by two noncommercial facilities, WSCC(FM), a 10–watt radio station in

[6] However, a regional industrial park has received money to begin and one local business intends to expand at the park. Tr. 218. A new shopping center was to begin operation in October, 1981. Tr. 184.

Somerset, and WKSO(TV), located in northern Pulaski County and licensed to the Kentucky Educational Television Network. TV–8 Exh. 1, p. 7. There are a few small, low power, mostly daytime only radio stations located in a few small towns within the proposed channel 16 coverage area. TV–8 Exh. 1, p. 6; Tr. 173–78.

34. Somerset has a daily (weekday) newspaper (Tr. 75–6; TV–8 Exh. 1, p. 7), a weekly newspaper (TV–8 Exh. 1, p. 7) and a shopper which contains no news. Tr. 49; TV–8 Exh. 1, p. 7.

35. There is heavy cable penetration in the Somerset area. Burnside's cable penetration, for example, is more than 90 percent. Tr. 442. Cable penetration in 1980 in the five counties on which a Somerset station must rely for local revenues (Pulaski, Russell, Wayne, Whitley and Laurel) averaged 47 percent. BG Exh. 4, Table E; Tr. 650. Cable television systems in Somerset and the Pulaski County areas provide subscribers with a variety of signals from Lexington, Louisville, Knoxville and Nashville, with which a Somerset station will be required to compete for audience and revenues (BG Exh. 3, p. 8; Tr. 303–20, 534–35, 616), as well as distant signals from even larger market stations, such as superstation WTBS, Atlanta. BG Exh. 3, p. 8; Tr. 314. A Somerset station will face increasing competition from pay cable movies, sports and other non-broadcast program services. BC Exh. 3, p. 9; Exh. 4, p. 10. HBO and ESPN are already being provided by cable in the Somerset area. Tr. 311–13, 317–18, 534–37.

36. Cable television will also make operation of a Somerset UHF television station, burdened with the "UHF handicap" (Tr. 683) more difficult because even though channel 16 will be the only local station in the Somerset area, cable television will equalize the quality of distant station signals with its signal. BG Exh. 3, p. 9.

37. A UHF television station in Somerset will have to compete for viewers with the programming of television stations in much larger markets, such as Lexington, Knoxville, Atlanta and Chicago, both on cable television systems or, to the extent that such signals can be received, over-the-air. BG Exhs. 1 and 3, p. 9; Tr. 682. Such large market stations can generate more revenues, and therefore can purchase expensive popular syndicated entertainment programming, and, many of these stations have the added advantage of being national network affiliates which offer network sports, entertainment and news. BG Exh. 3, p. 10. While some question was raised as to whether network programming and most high-cost syndicated programming were more popular than other kinds of programming, for example, a local call-in agricultural show, (See Tr. 539–42), on balance the evidence presented shows that popular network programs such as "MASH," "Alice," or "Monday Night Football," will attract a larger audience than other programming for the foreseeable future. BG Exh. 3, p. 10; BG Exh. 19; Tr. 683. A broadcast station must

provide competitive programming to obtain audiences and audiences are needed to attract local merchants and others as advertisers on the station. *Id.*, see also Tr. 682.

38. Somerset area residents have never had a local commercial television station and are used to watching top 100-market television programming from Lexington and Knoxville stations, either via cable, or by use of rooftop and outside tower antennas. BG Exh. 3, p. 7; BG Exh. 19; Tr. 532–33, 613. The Somerset station will have to compete for audience with these larger market stations. BG Exh. 3, p. 7; BG Exh. 1, p. 3; Tr. 682. Without network programming, the likelihood of a Somerset station surviving such competition is diminished. Tr. 548–49, 562–63, 584.

39. There are also a number of technical problems which will face a new UHF television station located in Somerset, Kentucky. Many households in Pulaski County and surrounding areas to the north of Somerset have installed high power UHF antennas to receive the signals of Lexington stations, an all UHF market, 75 miles from Somerset to the north. BG Exh. 3, p. 11; Tr. 605, 786, 794–95; see also BG Exh. 1, p. 9. Homeowners with such high power antennas are affected by interference, that is, a signal overload which would degrade reception of a television station located in Somerset. Tr. 750; BG Exh. 3, p. 11. To mitigate this signal overload in order to adequately receive channel 16, a homeowner will have to install a trap or rotor. BG Exh. 3, p. 11; Tr. 746, 751, 786–88.

40. Households in the southern part of the proposed channel 16 coverage area can receive signals of the two Knoxville VHF stations (and the full power educational VHF station in Sneedville, Tennessee). BG Exh. 3, p. 12; BG Exh. 1, p. 9. Thus, there is the possibility that many of these households do not have adequate UHF rooftop antennas, a chronic problem faced by UHF stations. BG Exh. 3, p. 11.

41. Competition for advertising dollars with existing local media (both radio and print) will be a problem faced by a new UHF television station in Somerset. BG Exh. 3; Tr. 713–14. Television stations must compete with radio stations for the advertising dollars of potential advertisers. BG Exh. 3, p. 12; Tr. 713. In very small markets, this competition is heightened because advertising funds are limited (Tr. 268), and television stations must keep their rates low enough to compete with radio. BG Exh. 3, p. 12. Somerset has three commercial radio stations, as well as a daily (weekday) and a weekly newspaper. *Id.*, p. 13.

42. Radio and television stations obtain local advertising (and therefore local revenues) from the same advertisers, particularly local banks, car dealers, furniture stores, grocery stores, soft drink bottlers, farm implement dealers, and fast food outlets. *Id.*, Tr. 168–69, 191, 350–51. A new television station in Somerset will have to compete with existing Somerset radio stations for the advertising dollars of such advertisers. BG Exh. 3, p. 13; Tr. 713–14. Small market advertising budgets are relatively fixed, and each medium (television, radio and print) must convince advertisers

that they should spend more on that medium, and therefore, less on competing media. BG Exh. 3, p. 13; Tr. 713–14.

43. An independent station in Somerset would face additional economic problems. There is little likelihood that Somerset will be treated as a separate market by the national rating services. BG Exh. 1, p. 9; BG Exh. 3, pp. 14–15; BG Exh. 4; Tr. 713. Without a separate market as defined by Arbitron (ADI) or Nielsen (DMA), a Somerset station cannot hope to attract significant national advertising dollars (BG Exh. 3, p. 15; Tr. 614), dollars which are, at best, difficult for any small market UHF station to attract. BG Exh. 4, p. 4; Tr. 679, 683.[7] A network-affiliated station in Somerset can reasonably expect to achieve some national advertising revenues (BG Exh. 3, p. 17; BG Exh. 4, p. 4; Tr. 567) as well as some network compensation revenue. BG Exh. 3, p. 16; Tr. 564–65, 567–68.

44. A network affiliate is also advantaged because it can sell to local advertisers commercials at the breaks within and between large audience, popular network programs. BG Exh. 3, p. 16. These "commercial availabilities" are very valuable because of the audiences attracted by network programs. *Id.*

45. Operation of a satellite will be much less costly than operation of a non-satellite television station. Bluegrass' annual costs will be only approximately $220,000; whereas, for example, TV–8's costs would be above $800,000. BG Exh. 3, p. 17; Tr. 341–42.

46. To evaluate "the economic viability of a new television station" in Somerset and to evaluate its revenue potential, Bluegrass provided an economic study prepared by Frazier, Gross & Kadlec, Inc. (Frazier, Gross) under the direction of its Executive Vice President, Charles Hadley Kadlec.

47. It shows that operated as a full-service conventional independent station, channel 16 would:

(1) derive the bulk of its revenues from local time sales to advertisers in a five-county area: Pulaski, Russell, Wayne, Whitley, and Laurel Counties, Kentucky;

(2) achieve, at full development, an 18.5% share of the total television revenue potential in the five-county area; and

(3) have first six-month gross revenues of $41,000; not exceed $419,000 in annual gross revenues by the end of the third year (30 months) of operation; and not exceed $685,000 in annual gross revenues by the end of the 1980's. BG Exh. 4, pp. 2–3.[8]

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[7] An independent station would be dependent on local sales (Tr. 675); local advertisers are less consistent than national advertisers in buying time when the economy is weak or changing. Tr. 712.

[8] These conclusions were based on a number of optimistic assumptions which make the revenue projections a "best case" favorable to independent station operation. BG Exh. 4, pp. 2, 9. Other

48. The testimony of Mr. Kadlec, "based on [his] knowledge of the industry and working with many small market stations . . . over the years" is that it is "very unlikely that [an] independent television station would be economically viable in . . . [Somerset]." Tr. 657. A free-standing non-satellite network affiliate "based on the revenue levels that we see potential for [in] the market, . . . would be very marginal, very difficult for even an affiliated station to operate profitably in this market." Tr. 658. Because of the high level of cable penetration in the proposed channel 16 service area, "it would be unlikely that an STV service would prove attractive" (Tr. 659), and indeed an STV station would be even less viable than an independent station, because an STV station would give up prime time and highly rated times a day, without achieving a significant subscriber penetration level because of the headstart of cable and the fact that an STV station offers only one signal and cable many. Tr. 659, 688–89.

### *III. The Applicants on a Comparative Basis*

49. *Diversification of Control of the Media.* The principals (Messrs. Brown, Taylor, Grissom and Rakestraw) that control 70% of the stock of TV–8 own all of the stock of Somerset radio broadcast station WTLO(AM). TV–8 Exh. 1, p. 1; TV–8 Exh. 2, p. 1; TV–8 Exh. 5; TV–8 Exh. 7. Currently, Taylor, Grissom and Rakestraw hold stock in Burnside CATV Corporation which holds 54% of TV–8's stock. But in order to comply with the designation order in this proceeding which requires that Burnside CATV divest its local cable television system, Taylor, Grissom and Rakestraw have indicated that Burnside CATV will assign its interest in TV–8 to them and they will divest their interest in Burnside CATV. TV–8 Exhs. 4, 5, and 7; Tr. 462–64. TV–8 also operates a cable television

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factors exist which were not considered but would also influence any final analysis. These omitted factors include: (1) the relative poverty and high unemployment levels in the Somerset area; (2) the difficulty an extremely small station is likely to experience in attracting skilled commercial production personnel required for the development of local advertising revenues; (3) the difficulty such a small station will have in generating sufficient revenues to purchase the high quality syndicated programming required to compete against Lexington, Knoxville, and other distant signals; (4) antenna orientation and other problems for video reception in the Somerset area; (5) the greater vulnerability to economic recession of very small market stations particularly those relying only on local advertising revenues; (6) radio competition for local advertising dollars; (7) the fact that there is no realistic possibility that an independent station in Somerset will ever achieve ADI; (8) the critical economic importance of a network affiliation to a small market station; (9) the assumption in the analysis that gross revenues will be available to the station, without any sales representatives or agency commissions; (10) potential new competition from (a) VHF stations in surrounding markets, (b) new low-power and translator television stations, (c) new radio stations and (d) DBS; and (11) the likelihood that existing cable systems will, over time, be rebuilt, or new systems will be installed, with 30 or more channel capacity. BG Exh. 4, pp. 9–10. Factors which might increase revenue potential, including expert management, outstanding or unusually good knowledge of the business community, outstanding programming, the possibility, however, remote, of a reduction in competition, and differing levels of cable penetration were, however, factored into the analysis. Tr. 646–51.

channel over two local cable systems which have 8,000 subscribers. Tr. 268–69.

50. Bluegrass Media operates television station WBKO, Bowling Green, Kentucky. BG Exh. 3, p. 2. It has no other media interests. Tr. 480.

51. *Full-time Participation in Station Operation by Owners.* E. Roy Taylor, president and director of TV–8, who ultimately would own 18% of the stock of TV–8 when Burnside CATV's interests are distributed to him, is proposed as the station's full-time general manager. TV–8 Exh. 4, p. 1. Mr. Taylor lives in Somerset and has for 18 years. *Id.*

52. At some unspecified time in the past Mr. Taylor has served as an ex-officio member of the board of directors of the Lake Cumberland Educational Satellite TV Consortium, a board member of the United Way of South Central Kentucky and an advisory board member to Somerset Community College on Co-op Education. TV–8 Exh. 4, p. 2. Mr. Taylor worked at a time he did not specify as the sales manager at WSFC and WSEK(FM) in Somerset. *Id.* He also holds a first class radio telephone operator's permit. *Id.* Mr. Taylor is now the president and general manager of Burnside CATV Corporation and he has also operated TV–8's closed circuit channel. *Id.* at p. 1.

53. Bluegrass Media seeks no credit for integration because of the satellite nature of its application. Tr. 483.

54. *Comparison of Coverage.* The areas and populations within the grade B and grade A contours of each of the proposals are as follows (BG Exh. 1, pp. 3, 4, 6, 7, 8, and 11):

*Grade B Service*

| *Applicant* | *Area (sq. mi.)* | *Population* |
|---|---|---|
| TV–8 | 3,146 | 148,150 |
| Bluegrass | 4,177 | 201,342 |
| Bluegrass advantage | 1,031 (32.8%) | 53,192 (35.9%) |

*Grade A Service*

| *Applicant* | *Area (sq. mi.)* | *Population* |
|---|---|---|
| TV–8 | 1,637 | 68,588 |
| Bluegrass | 2,471 | 101,502 |
| Bluegrass advantage | 834 | 32,914 |

55. Those served by one applicant but not the other within the grade B and grade A contours of each of the applicants are as follows (*id.*):

*Grade B Differential Service*

| *Applicant* | *Area (sq. mi.)* | *Population* |
|---|---|---|
| TV–8 | 142 | 6,241 |
| Bluegrass | 1,173 | 59,433 |
| Bluegrass advantage | 1,031 | 53,192 |

Grade A Differential Service

| *Applicant* | *Area (sq. mi.)* | *Population* |
|---|---|---|
| TV–8 | 100 | 2,317 |
| Bluegrass | 934 | 35,231 |
| Bluegrass advantage | 834 | 32,914 |

*Other Available Service*

56. The following tabulation sets forth the areas and population outside the common grade B service area which would receive a first, second, third and fourth grade B television service from each of the applicants (Bluegrass Exh. 1,pp. 4, 9, 11):

| *Service, TV–8* | *Area (sq. mi.)* | *Population* |
|---|---|---|
| First | 30 | 558 |
| Third | 112 | 5,683 |
| *Service, Bluegrass* | | |
| First | 555 | 13,853 |
| Second | 15 | 409 |
| Third | 204 | 8,646 |
| Fourth | 399 | 36,525 |

57. In establishing the number of other television services available to the differential areas encompassed by the proposed grade B contours of the competing applicants, the following stations were considered (BG Exh. 1, pp. 9, 13):

| *Call Sign* | *Location* | *Channel No.* | *ERP(kW)* | *HAAT (feet)* |
|---|---|---|---|---|
| WAVE | Louisville, KY | 3 | 100 | 910 |
| WATE | Knoxville, TN | 6 | 100 | 1,490 |
| WBIR | Knoxville, TN | 10 | 316 | 1,790 |
| WLEX | Lexington, KY | 18 | 1,100 | 640 |
| WKYT | Lexington, KY | 27 | 2,360 | 980 |
| KTVQ | Lexington, KY | 36 | 2,113 | 996 |

58. Bluegrass proposes to provide a first ABC television network grade B service to 105,212 people in an area of 2,476 square miles. BG Exh. 1, pp. 4, 10, 11.

59. *Efficient Use of Frequency: Auxiliary Power.* Only Bluegrass proposes auxiliary power. Tr. 482.

### *IV. The TV–8 Stockholders' Guarantee of Its Bank Loan*

60. After several revisions of its letter promising to lend TV–8 $800,000 and a change in its name, the United American Bank of Kentucky has indicated that it relies only on the personal guarantees of the following individuals: James A. Brown, James D. Crase, Janice Crase, Albert McGuire, John M. Mize, Ann Mize, Charles Coldiron, E. Roy Taylor, T. B. Grissom, Jr., and Harris Rakestraw, Jr. Letter from Frank B. Barker, President, United American Bank of Kentucky to E. R. Taylor, President TV–8, Inc. filed May 4, 1981. Each has in turn indicated they will guarantee the loan. TV–8 Exhs. 19–26.

### *Conclusions of Fact and Law*

### *Joint Control of WTLO(AM) and Channel 16*

61. TV–8, Inc. has not established that common control and operation of the proposed UHF television station on channel 16, Somerset, Kentucky and the existing AM radio broadcast station WTLO(AM), in Somerset would be in the public interest. Generally, the Commission's rules limit licensees to one broadcast license in a market. However, UHF television station applicants, who are already broadcast licensees in the same community and who filed their application before 4:30 p.m., September 13, 1979, are considered on a case-by-case basis. While the limitation on granting only one broadcast license per market to an applicant restricts entry to broadcasting, it does so to "serve the fundamental purpose of promoting the availability of a diversity of sources of information (or viewpoints) essential to an informed electorate. Such structural rules also promote economic competition." *Proposed Amendments (Docket 79–233)*, 2 Current Service P. & F. Radio Reg. 53:29 (1979). The granting of TV–8's application would undermine both of these fundamental objectives. In addition, TV–8 has not demonstrated that the barriers presented in establishing a UHF facility in Somerset would be overcome if channel 16 and WTLO(AM) are jointly controlled.[9]

[9] The Commission has recently undertaken an analysis of the "three areas in which common ownership of a radio station in the same market has been generally assumed to provide advantages for

62. TV–8 urges that joint ownership will achieve certain economies in initiating UHF service in Somerset. Among those foreseen is a saving on rent. However, the economy from any saving on rent cannot be ascertained on this record, and if one could, whether it results from joint ownership is doubtful. The building in which WTLO is located is owned by WTLO's shareholders as a partnership and these same partners also control TV–8. The partners indicated that TV–8 would have to pay rent, although possibly a reduced rent. However, they did not indicate how much the savings would be. In any event, it appears that any saving on rent results from the fact that TV–8's shareholders own a building, not from the proposed joint ownership with WTLO, since TV–8 indicated that if WTLO were sold, TV–8 would still have the same rent advantage. TV–8 also stated it believed it would save $216 per year on the William B. Tanner subscription service because WTLO also subscribes and, for the same reason, it could obtain five weeks of the AP news service for free. Aside from the fact that the impact of these savings is not based on any statement from the services (it is, thus, no more than the unsubstantiated view of TV–8) no attempt was made to show how this would have any real impact on TV–8's first year budget of $800,000.

63. TV–8 also attempted to demonstrate that it would share WTLO's staff which would provide expertise and a reduction in staff expenses. The record indicates no reasoned plan for sharing. In part, this is because WTLO has a very small staff (only six full-time employees) and they have no experience in operating a television station.

64. The proposed sharing of WTLO staff member Mike Murphy illustrates the problem with TV–8's showing. Mr. Murphy is currently employed as WTLO's program director and he does announcing. TV–8 has indicated that he will do promotional work for channel 16 and that he will be its full-time sports director. Not only does he not perform either function at WTLO, and thus it cannot be claimed that his experience at WTLO can now be transferred to channel 16, it also appears that he will not be shared since he is scheduled to work full-time at channel 16. TV–8 has not indicated what savings there might be in Mr. Murphy's salary if he were to take on two full-time jobs.

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overcoming barriers to UHF entry: cross subsidization, investment start-up costs and expertise, and economics of joint operation." *Id.* at p. 53:31. The Commission concluded "that the advantages are generally small, nonexistent, difficult to measure, or contrary to Commission objectives." *Id.* While the Commission has sought public comment on eliminating the exception to the ownership rules asserted here, it has not made the proposed change. However, in the interim it no longer designates such issues for hearing, and it has concluded that the history of the exception asserted by TV–8 has demonstrated "that the benefits—promotion of UHF development by these particular exceptions to the rules—are illusory." *Id.* at p. 53:29. The Commission has found that maintaining the exceptions decreases the possible number of diverse program sources every time an application is granted under them. *Id.* This case, as the preceding findings of fact and the following discussion illustrate, serves to reinforce the Commission's conclusions.

65. The proposal to share James Brown, who holds 16 percent of TV–8's stock, is at best unreliable, if not illusory. Currently he is WTLO's full-time station manager, technician and engineer. He indicated at the hearing that he would do promotional work for channel 16, but he did not demonstrate that his current work at WTLO, or his past work elsewhere, encompasses such a skill. At another point he indicated that he would be shared to perform "technical and service requirements" and at still another time he indicated that his role had not been determined. Other witnesses indicated Mr. Brown would direct and supervise production personnel. Even if the last representation is the correct one, the benefit to TV–8 is limited since this function turns out to be no more than keeping track of which employees of WTLO, if any, would be available for production work at TV–8.[10]

66. TV–8 also proposes to share WTLO's news and sports personnel but the method proposed would seriously undercut the Commission's diversity objective. A carbon copy of sports and news stories prepared at WTLO would be given to channel 16. (TV–8 did not indicate which station would use the story first.) TV–8's plans for maintaining a separate editorial policy seem confused. Mr. Brown stated that he would direct the policy at WTLO and Mr. Taylor would be responsible for channel 16's. But then Mr. Brown explained that someone else made the determination of what would be broadcast at WTLO and that he would do so at channel 16. Mr. Taylor appeared to indicate that there would be no separate policy. If news stories are simply going to be repeated on one facility or another, Mr. Taylor may be correct, there will be no separate editorial policy. TV–8 did not clarify that important point, nor did it indicate who would be responsible for news at channel 16. It should be noted that TV–8 did state that sales people might gather news when they sold advertising. But again this provides no shared saving resulting from the cross-ownership.

67. Finally, assuming that the four WTLO employees identified by TV–8 are shared, their impact on helping channel 16 overcome its UHF handicap is diminished by their lack of experience. None of the WTLO employees that are to be shared have television experience. (While Mr. Murphy has closed circuit television experience, it is questionable whether he will be shared.) Moreover, it is also possible that WTLO employees would be available to channel 16 only if they moonlight. It follows that, if there is any benefit to be gained from their experience, it may be at no saving to the station. In the end, the record as a whole does not support a conclusion that the WTLO staff will be shared with channel

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[10] TV–8 has also asserted that Mr. Brown's daughter, Kim, who currently does custodial work for WTLO, would do the same for channel 16. But sharing her results in no saving since she is effectively not being shared. She only works part-time and would be paid four times her current wages by TV–8. Moreover, her skill is not unique to broadcasting and cannot be said to have resulted from the proposed cross-ownership.

16 in a manner that would ease channel 16's entry into the market, or serve the public interest.

68. While TV–8's president, Roy Taylor, stated that channel 16 could use WTLO's audio console for production, its copying and office equipment, and its car with a radio in it, he indicated he did not see a significant use for the audio console at the station since TV–8 already has its own.

69. TV–8 also urged that WTLO sales experience might be of aid to TV–8. However, TV–8 stated that while sales information would be given by WTLO to channel 16, the sales staff of WTLO would have nothing to do with channel 16. TV–8 additionally asserted that WTLO would promote channel 16 through advertising, but it would do so only if channel 16 would reciprocate. And, as is typical in these showings, TV–8 also promised that profits from WTLO would be made available to channel 16. In 1980 WTLO had a profit of $5,000 and the increase expected in 1981 would amount to only $320. Moreover, the record reflects that all of WTLO's current surplus cash is needed to meet payments of debt. In any event, assuming all the profits from WTLO are available, it would not justify cross-ownership for two reasons: First, it could hardly be stated that WTLO's contribution is significant since TV–8 estimates that its first year expenses would be approximately $800,000. And second, the Commission has pointed out that any business or individual could do the same—in other words, money earned in radio broadcasting does not carry with it properties that assist a new UHF television station any better than money earned in some other business.

*The Satellite Proposal*

70. Bluegrass Media proposes to operate in Somerset a semi-satellite of its network affiliated Bowling Green, Kentucky station. The satellite will carry the same programs as the Bowling Green station except that, nightly, Bluegrass Media will broadcast one-half hour of local Somerset news which it will gather with a local staff and transmit by microwave to Bowling Green. Bluegrass Media has also promised to produce a monthly local public affairs program and to increase independent satellite programming as revenues increase. Although most of the proposed programming will be the same on each facility, Bluegrass Media's satellite proposal would present new television service to the area since the service area of the satellite and the parent do not overlap.

71. Under the Commission's satellite policy "a television satellite station is a creature of necessity, created to provide television service to small communities and/or sparsely settled areas which are economically incapable of supporting their own local television station." *Central California Communications Corp.*, 47 F.C.C. 2d 1002 (1974).[11] It is the Commission's

[11] The satellite is a regular television station, operating on a channel assigned to its principal community in the table of allocations and meeting all of the technical rules for television station operation. *Id.*

hope that a satellite station once authorized will some day become a full scale local television station. *Id.* Satellites are permitted for economic reasons, but a satellite that originates 5% local programming and/or has achieved income which would be considered sufficient to support a full-service station is required to upgrade its operation. *Id.* at pp. 1002–03, 1004.[12]

72. All of the parties including the Broadcast Bureau, agree that establishing a full-service UHF television station in Somerset is going to be a risky proposition. The service area of the station is relatively small and economically depressed: Somerset's population is 16,000 and households are only growing at an annual compounded rate of 1.57 percent; median family income is $4,000 below the Kentucky average; and unemployment has been increasing for three years, in December, 1980 it was 10.1 percent.

73. In this relatively poor economic setting, a new UHF station would compete for revenue with three commercial radio facilities and the existing print media, a weekday newspaper, a weekly, and a shopper. In addition, in the principal five county area around Somerset where a new UHF station could look for revenues, there is established average cable penetration of 47%.[13] Moreover, in parts of the primary service area viewers who do not have cable now receive with rooftop antennas large market network affiliates. These off-the-air viewers present certain technical problems to a new UHF station because in part their antennas are oriented toward UHF signals in the opposite direction from the one which Bluegrass Media and TV–8 propose and in part some areas now view only

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[12] In fact the Commission has found the revenue test to be superior because a "broadcaster needs no external encouragement to maximize revenues, and a satellite operation will therefore quite naturally become a full scale local television station when sufficient revenues are available to sustain such an operation." *Id.*

[13] The Broadcast Bureau differs with Bluegrass Media about its argument that cable penetration will have a significant effect on the ability of a new UHF station to gain an audience and establish itself. It points to the Commission's findings that "the near-term effect of eliminating the syndicated exclusivity rules on local station audiences is minimal." *Cable Television Syndicated Exclusivity Rules*, 71 F.C.C. 2d 951, 966 (1979). The Bureau notes that the Commission estimates a 1% reduction in the short-term in a local station's audience when they compete with syndicated programming carried by distant signals on the cable, and 9% reduction in the long-term. This reference is not dispositive however, since the statistic cited and the conclusion presented is relevant only to an established station in the market when it carries syndicated programming on a cable television system. The ability of a new UHF station to establish itself in a small market against long entrenched viewing patterns (either off-the-air or on-the-cable) is not encompassed within the analysis cited. The Bureau has pointed to no evidence that contradicts Bluegrass Media's basic premise that existing viewing patterns would present a significant hurdle in establishing an audience for a new UHF facility. The Bureau's other point in this context is that local programming would greatly add to a new UHF station's ability to compete. The subject is a complex one and the rationale asserted by the Bureau is not supported on this record. For example, it has been pointed out elsewhere that high ratings and strong local programming can only be achieved through the use of experienced personnel and extensive infusions of capital, and even then a local station may lose nearly half its potential audience to distant signals and other cable services during periods of local programming. Mitchell, *The Local Station That Could*, CHANNELS OF COMMUNICATIONS, p. 34 (February–March 1982).

VHF signals. From these current viewing habits a strong inference arises that a new UHF station would need to convince viewers to make changes in longstanding viewing habits, and probably at some individual expense.

74. Despite these drawbacks, TV–8 has urged that a full-service UHF station could generate over a million dollars in advertising revenues. Left unexamined this claim would seem to undercut the foregoing arguments made by Bluegrass and, for that matter, TV–8's argument that establishing a UHF station is risky and requires the cross-ownership of an existing radio station with the proposed television station. Two extrinsic factors argue against TV–8's revenue projection: First, TV–8 is only willing to develop channel 16 if it can be cross-owned. Second, while it does not present a direct analogy, if TV–8's closed circuit origination channel is any indication, a local television facility is going to face significant barriers. TV–8 sustained significant losses in its operation in each of the last three years, despite the fact that the origination channel's costs were much lower than those projected for channel 16.

75. But perhaps more importantly, the record indicates that TV–8's estimate has no rational basis. The million dollar revenue estimate was, according to TV–8, based on its operation of its cable origination channel, but as just indicated, the use of that channel as a benchmark seems particularly unconvincing in light of its repeated losses, to establish the strength of the Somerset advertising market. The methodology applied by TV–8 is even more suspect: TV–8 derived the million dollar figure by multiplying the cost of a radio spot ad by five which it then assumed would be the price of a television spot and, to determine the number of ads it could sell, it then multiplied the number of cable closed circuit spots it sold by five. There is no support in this record that any of the relationships assumed by TV–8 are accurate; namely, that the television spots would sell for five times market rates for radio spots and that TV–8's closed circuit ads could be increased five times.

76. The reliability of TV–8's revenue estimate is further undermined by its earlier belief that only $325,000 could be relied on and its failure to adequately explain why in Somerset's deteriorating economy it believed that more than three times the revenue it originally estimated would now be available. Bluegrass Media's expert witness indicated that TV–8's method did not follow orthodox industry methods for determining revenue potential. None of the parties, it should be noted, actually determined how much is now spent on advertising in Somerset and whether this amount would be spent on local television advertising.

77. Nevertheless, the economic picture in Somerset is not completely bleak. A new industrial park is planned and a new shopping center has been established. It should also be noted that while Somerset has a small population, over 100,000 people will come within Bluegrass Media's pro-

posed grade A service area and nearly double that within the grade B service area.

78. Generally, the Commission has found that it has great difficulty in projecting UHF television development; the Commission has recently pointed out that even under the best of circumstances it has been unable to calculate the likelihood of UHF development to a degree that assures certain outcome. *VHF TV Top 100 Market*, 81 F.C.C. 2d 233, 247 (1980). In part, this is the case because market conditions are variable and the conditions that foster television service are now changing rapidly. *Id.*

79. The record in this proceeding, when it is recognized how difficult it is to make accurate and long term predictions in this area, establishes to the degree necessary that Somerset would have significant difficulty supporting a full-service UHF television station at this time. This is reason enough under current Commission policy to permit Bluegrass Media to begin its operations in Somerset as a semi-satellite. Recognizing, of course, that if the market incentives work as the Commission indicated in *Central California Communications Corp., supra.* (*viz.* a broadcaster will maximize revenues) the Bluegrass satellite will become a full-scale local television station when the market will support such an operation. In the meantime Bluegrass Media has promised to broadcast nightly local news and a monthly local public affairs program. It is also going to have a staff of six (a station manager, receptionist, newsperson, camera person, engineer, and sales person) in Somerset, which will, presumably, establish the station's local presence in the community. BG Exh. 3, p. 18. Moreover, the likelihood of success of a new UHF in a small community will be increased greatly since Bluegrass will have annual costs of only approximately $200,000; whereas TV–8 estimated in this proceeding that a full service facility would cost $800,000 in the first year.[14]

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[14] The Broadcast Bureau appears to urge a comparison of TV–8's past closed circuit programming and its proposed local programming with Bluegrass Media's local programming proposal to assess the merit of granting one application or another. See Broadcast Bureau's Proposed Conclusions of Law, pp. 20–22. The effect of this, the Bureau argues would be to find that TV–8's proposal would better serve local viewers. This analysis, however, does not accurately reflect the designation order, the facts of record, or existing law. The comparison between local programming proposals is not one intended by the designation order. Moreover, the facts of this record show virtually no advantage to local diversity in establishing a local UHF station by granting TV–8's cross-ownership proposal. Instead, the record proves that there would be a significant disadvantage because TV–8 would diminish local diversity on both structural and programming grounds: WTLO has few, if any, resources that would aid channel 16; it would be jointly controlled with WTLO; and it would present the same news and sports programming as WTLO. On these grounds Bluegrass Media offers greater diversity insofar as it would offer local news initiated by a media entity not now present in the community. Finally, it would be inaccurate to assume that TV–8's programming would be either more local or better; this record does not demonstrate that TV–8's local programming proposal is more meritorious than Bluegrass Media's. Those programming areas discussed at the hearing by TV–8 were indefinite and often confused or contradictory. Finally, while it could be argued that TV–8 proposes an integrated principal and it would therefore have a strong presence in the community to measure local needs and interests, as a practical matter there may be no difference because Bluegrass Media proposes a local staff whose only responsibility would be local interests, albeit not one coupled with ownership.

80. While Bluegrass Media's proposal would insure structural diversity and actual, although limited, programming diversity, and TV–8's proposal would not, there is a possibility that if channel 16 were to remain dark another applicnt might come along who would not present the cross-ownership problems of TV–8 and would be willing to risk establishing a full-service operation. The Broadcast Bureau notes that history to some extent argues against such a possibility since until this proceeding there were no applicants from the time the channel was allocated in 1966. But that history, which has been similar nationwide, appears to be changing, today many more UHF channels are being applied for and put into service. There are also new technological uses that assist local non-network UHF's to obtain programming, and formerly dark UHF channels are often being used for specialized formats. However, granting Bluegrass Media's application would not foreclose local and diverse use of Somerset's channel 16. The Commission has pointed out that if a full-service applicant should appear when the satellite's authority to operate expires, it would very likely receive an advantage in a comparative hearing. *Suburban Broadcasting Corporation*, 83 F.C.C. 2d 359, 370 (1980).

81. In fact to hasten full service the Commission has conditioned satellite grants on the building of a local studio, and in one instance it granted the applicant only a temporary six month permit. *Meyer Broadcasting Company*, 67 F.C.C. 2d 593, 596 (1978); *Spanish International Communications Corporation*, 37 F.C.C. 2d 320, 322 (1972). *Midcontinent Broadcasting Co. of Wisconsin, Inc.*, 12 F.C.C. 2d 111 (1968). The Commission has also required a satellite to become a full-service outlet when the satellite's revenues warranted such a change. *Central California Communications Corp., supra.*

82. Bluegrass Media's showing was based largely on historical data about UHF development nationally which it then imposed on local economic conditions. Bluegrass Media did not, for example, carry out a study of the actual availability of advertising dollars in Somerset. Recently, the Commission stated that it has found showings such as the one presented by Bluegrass Media to be less reliable than had been traditionally thought. Statistically viable UHF stations are increasing and local uses for UHF channels are expanding. It is, of course, from these factors that the Commission concluded that UHF development is to some extent unpredictable. In consideration of the rapid changes going on in television broadcasting and distribution and, in particular, UHF development, the community of Somerset would be better served by limiting Bluegrass Media's initial license term to two years. This would give Bluegrass Media an opportunity to develop its facility and either demonstrate that adequate local revenues are present to support a full-service station or that a satellite is all that can be maintained. The shortened license period will

also allow potential full-service applicants, who would not diminish diversity like TV–8, to compete for the facility. Finally, it will also ensure that the public will receive the greatest amount of local service now possible within a reasonable amount of time.[15]

*Comparative Considerations*

83. TV–8's principals hold the license for one of the three commercial radio broadcast stations operation in Somerset. Bluegrass Media operates a full-service station at Bowling Green, Kentucky but the station's service area would not overlap with the semi-satellite it proposes. On diversification grounds, therefore, Bluegrass is entitled to a preference.

84. Bluegrass Media proposes no integration and TV–8 would integrate E. Roy Taylor. Mr. Taylor would eventually hold 18% of TV–8's stock when Burnside CATV divests. He is now its president, and a director, and would be the station's general manager. Mr. Taylor has lived in Somerset for many years and he has indicated an interest in the welfare of the community. He also has broadcast experience. TV–8 is entitled to a preference for its integration of Mr. Taylor.

85. Bluegrass Media, however, receives a slight preference for its provision of auxiliary power and a preference for its coverage. Bluegrass will service significantly more people and area than TV–8 with its grades A and B signals. However, the preference is somewhat diminished because the number of persons receiving a first service is small (13,853) and those receiving a second service is also small (409).[16]

86. Bluegrass Media is to be preferred on the diversification factor and this preference outweighs TV–8's relatively small integration credit. *Henderson Broadcasting Co., Inc.*, 63 F.C.C. 2d 419, 427–28 (1977). In addition, Bluegrass Media is entitled to a slight credit for its auxiliary power. *Id.* And Bluegrass Media is entitled to a slight preference over TV–8 on the basis of its coverage. *Town and Country Radio, Inc.*, 65 F.C.C. 2d 694, 714–15, 716 (1977). These last two preferences when coupled with Bluegrass Media's preference in diversification outweigh TV–8's integration credit. If this case were to be decided on comparative grounds Bluegrass Media would prevail.

*Summary*

87. However, the comparative issue does not enter into the resolution of this case. Both TV–8 and Bluegrass Media have made conditional proposals for using channel 16, Somerset. TV–8, Inc. would operate the

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[15] The public interest requires the solution outlined above in order to resolve the issues designated in this hearing consistent with current Commission policies. See *New York University*, 19 F.C.C. 2d 358, 371–76 (1969).

[16] In addition, an issue is presented about whether certain of TV–8's principals would, as the bank requires, guarantee its bank loan. The relevant parties have now indicated they will do so.

channel only if allowed to continue to operate one of three commercial radio stations in Somerset. To this end, it was unable to satify the Commission's policy requirement that the combination must reduce the barriers in establishing a new UHF facility in the community. Bluegrass Media proposes to use channel 16 as a semi-satellite of its network affiliated Bowling Green VHF television facility. Bluegrass Media has demonstrated that, at least for now, a semi-satellite is necessary in Somerset, Kentucky. In addition, there are also some long term benefits to structural and programming diversity that could evolve from Bluegrass Media's operation of channel 16. Bluegrass Media holds no other licenses within the service area and it will bring a new voice to Somerset by presenting nightly local television news. And, as the Commission has noted, there is every incentive for a satellite to increase its local programming because to do so brings added profit. TV–8's application, on the other hand, would not promote diverse sources of information and economic competition.

ACCORDINGLY, IT IS ORDERED that the application of TV–8, Inc. (File No. BPCT–780720IA) for a construction permit to operate a television station on channel 16 at Somerset, Kentucky IS DENIED and the application of Bluegrass Media, Inc. (File No. BPCT–790507KM) for a construction permit to operate a semi-satellite of channel 13, Bowling Green, Kentucky on channel 16, Somerset, Kentucky IS GRANTED, on the condition that a license to operate will be granted for two years from the date it is issued.[17]

FEDERAL COMMUNICATIONS COMMISSION

Edward J. Kuhlmann
Administrative Law Judge

[17] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Sec. 1.276(d).

Agreement, Between Applicants
Merger and Drop Out Cases
Review Board, Interlocutory Matters
Settlement

Review Board denies appeals and affirms Administrative Law Judge's order approving settlement agreement but reducing term of consulting agreement from ten to three years. Since public and fledgling station will benefit from assistance of experienced broadcasters in inaugural period, agreement is *bona fide*. However, necessity not shown for term longer than three years.
—*Texas Television, Inc.*
BC Docket No. 80–578

FCC 82R–57

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

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| In re Applications of | |
| TEXAS TELEVISION, INC.<br>Austin, Texas | BC Docket<br>No. 80–578<br>File No. BPCT–<br>790716KC |
| AUSTIN TELECASTING COMPANY<br>Austin, Texas | BC Docket<br>No. 80–579<br>File No. BPCT–<br>791025KE |
| MOUNTAIN LAUREL BROADCASTING, INC.<br>Austin, Texas | BC Docket<br>No. 80–580<br>File No. BPCT–<br>791026KF |
| TELEVISION CORPORATION OF CENTRAL TEXAS<br>Austin, Texas | BC Docket<br>No. 80–581<br>File No. BPCT–<br>791026KG |
| For Construction Permit | |

MEMORANDUM OPINION AND ORDER

Adopted: September 15, 1982; Released: September 20, 1982

BY THE REVIEW BOARD:

1. Two appeals have been filed as a matter of right, 47 CFR 1.302(a), from Administrative Law Judge Coufal's Memorandum Opinion and Order released June 7, 1982 (FCC 82M–1799), approving a settlement agreement as modified. Television Corporation of Central Texas (Television of Texas) has appealed that order to the extent that it reduced a consulting agreement from a ten to a three year term. The Broadcast Bureau objects to the approval of any consulting agreement at all. For the reasons set out below we affirm the Administrative Law Judge because his order is consistent with Commission policy. *See, e.g., Venton Corp.*, 90 FCC 2d 307, 51 RR 2d 1208 (1982), and *Gemini Broadcasting Co.*, 90 FCC 2d 239, 51 RR 2d 1188 (Rev. Bd. 1982).

2. The settlement agreement provided that three of the four applicants would merge into a partnership known as Austin Television. The fourth applicant, Television of Texas, was to be reimbursed to the extent its expenses did not exceed $50,000; and each of its seven principals would have the opportunity to purchase up to 1 percent interest in the Austin Television partnership. The final provision, which has generated this controversy, was a consulting agreement to be executed between the Austin Television partnership and Television Consultants, an organization made up of Television of Texas' principals, providing for the payment of $15,000 per year to the consultant for ten years.

3. After reviewing the written showing, conducting a conference, and receiving additional information, the Adminstrative Law Judge approved the agreement, except for the ten year term which he found had not been justified and therefore constituted excessive reimbursement. Since the agreement authorized modification of the consulting agreement, he reduced the term from ten to three years because "the longest term consulting agreement mentioned by the parties is three years," and a three year agreement had been approved in another case. ALJ's Order, *supra*, para. 7.

4. The Bureau's appeal argues that the consulting agreement consitutes excessive reimbursement because the applicants have failed to justify its terms. We agree with the ALJ that except for the ten year term, the required explanation and justification has been made. The agreement is a *bona fide* transaction. *See Venton Corp.*, 90 FCC 2d at 312. See also discussion below.

5. The issue raised by Television of Texas is whether the ALJ violated Commission policy when he modified the terms of the consulting agreement. Generally, the Commission seeks to avoid undue interference with *bona fide* arm's-length agreements of the parties. As the Commission recently stated in *Venton Corp., supra*, it will refrain from restricting the merger or trading of business interests and the exercise of the applicant's

business judgment to a precise dollar figure representing the legitimate reimbursable expenses. However, the Commission also indicated that its policy must be tempered by countervailing considerations, particularly the command of Section 311(c)(3) of the Act, as well as Congressional and Commission efforts to prevent manipulation of applicants or disguised payoffs. Thus, when faced with a very lengthy consultancy agreement combined with reimbursement for expenses, it is necessary that the applicant persuasively demonstrate the *bona fides* of the transaction. *See Gemini Broadcasting Co., supra*, 90 FCC 2d at 242–243.

6. It was the responsibility of the ALJ, in the first instance, to determine whether the proposed agreement was *bona fide* or whether it was merely a device to evade the limitations in the Act. It was therefore incumbent upon the parties to proffer the information necessary to permit such an analysis. Thus, the applicants in *Venton, supra*, 90 FCC 2d at 314, were requried to "submit a full explanation and justification of the parties' exchange of considerations." *See also Gemini Broadcasting Co., supra*, 90 FCC 2d at 243. Here, Television of Texas claimed that the assistance of the withdrawing applicants was necessary to provide the expertise connected with inaugurating a new UHF station. Accordingly, the ten year term in the agreement was not justified for, as the Administrative Law Judge noted, the longest term consultancy mentioned by the parties themselves did not exceed three years. Significantly, the television license to be issued runs for only five years whereupon it must be renewed. 47 U.S.C. 307(d). Nor are we aware of any obstacle to the parties renegotiating the agreement after the expiration of the three year term, if the parties conclude that they would profit from such an action.

7. On the basis of the record before us, we will affirm the ALJ. While the Broadcast Bureau argues that no consultancy agreement should be approved, we believe the parties have evinced *bona fides* in stating that the fledgling station and the public will benefit from the assistance of experienced broadcasters in the inaugural period. However, and keeping in mind that—until recently—the entire term of a license of a TV station was only three years[1], the parties have not demonstrated why the licensee should not be completely competent by the end of three years. While neither the Communications Act, nor the orders here, precludes the parties in any way from renewing the agreement at any time after some initial period, the parties have not clearly shown that a ten-year consultancy will be necessary this far in advance when the station has not even begun service. On balance, then, we cannot fault the ALJ's reasoning. While the Commission—and the law generally—firmly favors settlements, *Western Connecticut Broadcasting Co.*, 88 FCC 2d 1492, 1497, 50

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[1] The length of license terms for TV stations was extended by P.L. 97–35, 95 Stat. 357, approved August 13, 1981, amending Section 307(d) of the Communciations Act, 47 U.S.C. § 307(d)(1981).

RR 2d 1335, 1339 (1982), it has a statutory obligation to administer the requirement of Section 311(c)(3) of the Communications Act.

8. ACCORDINGLY, IT IS ORDERED, That the Appeals of both the Broadcast Bureau filed August 9, 1982, and Television Corporation of Central Texas filed on July 23, 1982 ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Reconsideration, Petition for

Board grants reconsideration to permit ten-year consultancy agreement where Congress made change in Section 311(c)(3) in effect repealing provision relied on by Board in previous opinions.
—*Texas Television, Inc.*
BC Docket No. 80–578

FCC 82R–76

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

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| In re Applications of | |
| TEXAS TELEVISION, INC.<br>Austin, Texas | BC Docket No. 80–578<br>File No. BPCT–790716KC |
| AUSTIN TELECASTING COMPANY<br>Austin, Texas | BC Docket No. 80–579<br>File No. BPCT–791025KE |
| MOUNTAIN LAUREL BROADCASTING, INC.<br>Austin, Texas | BC Docket No. 80–580<br>File No. BPCT–791026KF |
| TELEVISION CORPORATION OF CENTRAL TEXAS<br>Austin, Texas | BC Docket No. 80–581<br>File No. BPCT–791026KG |
| For Construction Permit | |

MEMORANDUM OPINION AND ORDER

Adopted: December 13, 1982; Released: December 15, 1982

BY THE REVIEW BOARD:

1. Television Corporation of Central Texas (Central Texas) requests reconsideration of our previous ruling which affirmed an Administrative Law Judge's approval of a settlement agreement while reducing a related consultancy agreement from a ten to a three-year term. FCC 82R–57, released September 20, 1982. Unlike most petitions for reconsideration which rehash arguments which have been previously rejected, petitioner's main point is that the statutory provision on which our ruling was based, a portion of Section 311(c)(3), was repealed by Congress and replaced by a new and different standard. *See Communications Amendments Act of 1982*, P.L. 97–259, 96 Stat. 1087, September 13, 1982. The Broadcast Bureau opposed reconsideration on November 3, and a reply was filed November 15, 1982. We will grant reconsideration because the basic statutory provision which the previous ruling was designed to enforce has been stricken by Congress, and neither the new standard nor the existing express language of applicable Commission rules is an impediment to the ten-year consultancy.

2. The settlement in this case was between a new partnership of Austin Television—the product of a merger between Texas Television, Inc., Austin Telcasting Company, and Mountain Laurel Broadcasting, Inc.—and Television Consultants, an organization composed of the principals of the remaining applicant, Central Texas. All provisions of the agreement were found to be consistent with the Communications Act and Commission policy except for a 10-year consultancy, with a yearly retainer of $15,000. Both the ALJ and the Board found that only a three-year consultancy had been justified.

3. Our previous order balked at the *bona fides* of a very lengthy consultancy agreement combined with reimbursement for expenses. In the absence of a full explanation and justification, which had not been provided, such an arrangement could have constituted a sham to circumvent the § 311(c)(3) prohibition against excessive reimbursement as the Bureau then argued. *See* FCC 82R–57, paras. 5–7; *Venton Corp.*, 90 FCC 2d 307, 51 RR 2d 1208 (1982). That ruling rested upon "the command of Section 311(c)(3)," para. 5, and "the requirement of Section 311(c)(3)," para. 7. Section 311(c)(3) then read as follows (brackets not in original):

> The Commission shall approve the agreement only if it determines that the agreement is consistent with the public interest, convenience, or necessity. [If the agreement does not contemplate a merger, but contemplates the making of any direct or indirect payment to any party thereto in consideration of his withdrawal of his application, the Commission may determine the agreement to be consistent with the public interest, convenience, or necessity only if the amount or value of such payment, as determined by the Commission, is not in excess of the aggregate amount determined by the Commission to have been legitimately and prudently expended and to be expended by such applicant in connection with preparing, filing, and advocating the granting of his application.]

4. Section 311(c)(3) has now been amended. See P.L. 97–259, 96 Stat. 1087. In essence, the new law strikes the bracketed language quoted above, and substitutes in its place the following new standard: "(B) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement." Section 311(c)(3), as amended, now reads as follows:

> The Commission shall approve the agreement only if it determines that (A) the agreement is consistent with the public interest, convenience, or necessity; and (B) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement.

5. Petitioner, Central Texas, contends that the Board's reliance on Section 311(c)(3) is no longer valid in the wake of the recent Congressional elimination of the excessive reimbursement prohibition. The Bureau responds that until the Commission modifies the requirements of Section 73.3525(a) of the Rules to establish standards and procedures for resolving whether an application was filed for the purpose of entering into a dismissal agreement, the proper policy is to retain and apply the standards in effect prior to the modification of Section 311(c)(3). (Bureau's Comments, para. 6.)

6. The Conference Report, No. 97–765, 97th Cong. 2d Sess. (1982), pages 49–50, accompanying the amendment of Section 311(c)(3) recognizes that settlements often avoid lengthy and expensive hearings, expedite initiation of new service, and generally serve the public interest. At the same time, Congress intended to prevent the filing of "strike" applications calculated to harass another applicant or coerce payment to the competing applicants. *Id.* Its suggestion that the Commission create procedures for expeditious action was designed to avoid, if possible, trial type hearings to ascertain "whether the application to be dismissed was filed for the purpose of entering into a dismissal agreement," *Id.* In this case there is no appearance or assertion by the Bureau that the application of Central Texas was filed for an improper purpose. The current requirements of Section 73.3525(a) of the Rules have been fully complied with, and absent some suggestion that the application was filed for an improper purpose there is no need for further procedures to obtain additional information.

7. Section 311(c)(3), as amended, also requires that the Commission find that the proposed settlement is consistent with the public interest, convenience and necessity. The Bureau now contends that the consultancy fails to meet this requirement. But the public interest standard has been a part of Section 311(c)(3) from the outset. Absent the statutory prohibition against "excess" reimbursement, which is not found in Section 73.3525(a) of the Rules, we are aware of no past construction of the public interest

standard which would prevent a potential broadcaster from entering into a lengthy consultancy agreement. The Bureau points to neither facts nor Commission precedent which support its position.[1]

8. This petition for reconsideration relied on facts which occurred since the last opportunity to present such matters as required by § 1.106(c) of the Commission's Rules, 47 CFR § 1.106(c). Our order was adopted on September 15, 1982, a mere two days after passage of the amendment, and by no amount of due diligence could petitioner have uncovered this new factor with any greater timeliness. As a result of the changes to § 311(c)(3), we have reconsidered our prior decision and shall approve the entire settlement agreement including the ten-year consultancy.

9. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed by Television Corporation of Central Texas on October 20, 1982, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

[1] In a Public Notice on November 17, 1982, the Bureau noted the amendment of Section 311(c)(3). It stated that the Commission's "present rules and policies do not conflict with the recent amendment" but that until conforming rule changes were enacted the Bureau would continue to apply 47 CFR § 73.3525. Since § 73.3525 does not conflict with the new statute, nothing in that rule section precludes our present action.

Common Carrier, International Record Carrier
Competition, Common Carrier
International Communications
Telex

Authorization granted to common carrier to re-enter the international record services marketplace pursuant to Record Carrier Competition Act of 1981.
—*Western Union Telegraph Co.*

FCC 82–378

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

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|---|---|
| In the Matter of | |
| THE WESTERN UNION TELEGRAPH COMPANY | File No. I–T–C–82–142 |
| Application for authority pursuant to Section 214 of the Communications Act, as amended, to establish, acquire and operate facilities for the purpose of extending communications services to overseas points. | |

MEMORANDUM OPINION ORDER AND AUTHORIZATION

Adopted: August 5, 1982; Released: August 12, 1982

BY THE COMMISSION:

1. The Western Union Telegraph Company (WU) has applied for authority, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. Section 214 (1980), to: (a) establish, acquire and operate facilities for the purpose of providing communications services between the United States and six overseas points; (b) establish, acquire and operate facilities between its operating center and the operating centers of the U.S. international record carriers (IRCs) primarily for the purpose of providing communications services on a transit basis to overseas points served by the IRCs; and (c) operate previously authorized facilities for the purpose of providing communications services between the United States and overseas points. WU also requests the Commission

to find that its provision of services to a large number of other countries is required by the public convenience and necessity.[1]

2. Our action today in granting WU's application and authorizing it to provide overseas record services is an important step in achieving the goal of fully competitive domestic and international record service markets in accordance with the Record Carrier Competition Act of 1981 (RCCA).[2] The RCCA amends Section 222 of the Communications Act to eliminate the statutory bar imposed by Section 222 on the provision of overseas services by WU.[3] In addition, the RCCA mandates full interconnection of domestic and international record carrier facilities to provide universal customer access to any carrier network. It also sets out a process to resolve issues concerning the types, conditions and charges for interconnection among the carriers. Related to this process, Section 222(c)(5) of the RCCA established a moratorium period during which the Commission was barred from taking final action on any WU application for authority to provide international record communications service. The statute indicated that the moratorium period would last 120 days following the date of a carrier agreement/Commission prescription but in no event longer than 210 days from the RCCA's enactment date.[4] The 210th day from the statute's December 29, 1981 enactment date was July 27, 1982.

## *I. The Application*

3. WU currently provides domestic public message telegram, mailgram, telex and TWX record services as well as various private line, satellite, and television services. In this application, WU proposes to extend its telex, TWX, telegram and private line services to overseas points. It states that it intends to provide a full range of services in the future. Additional services to be provided later will include mailgram, television, teleconferencing, high speed data, teletex (high speed telex) offerings and other private line services.

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[1] WU lists 167 countries or locales in Appendix C of its application.

[2] P.L. 97–130, 95 Stat. 1687.

[3] Section 222 was enacted in 1943 as a statutory exemption to the antitrust laws to facilitate the merger of the two domestic record carriers—Western Union and Postal Telephone and Telegraph. As a part of the merger, Section 222(c) required the merged carrier, WU, to divest its international operations. Section 222 was later interpreted to prohibit any overseas offerings by WU. *See* WU v FCC, 544 F. 2d 87 (2d Cir. 1976) and ITT v. FCC, 635 F. 2d 32 (2d Cir. 1980).

[4] The parties failed to reach a negotiated agreement and on April 8, 1982, the Commission released its Interim Order prescribing interconnection arrangments. *See* Interconnection Arrangements Between and Among the Domestic and International Record Carriers, CC Docket 82–122, Notice of Proposed Rulemaking, FCC 82–102, 89 FCC 2d 194, Mimeo No. 30957 (released March 3, 1982); Interim Order, FCC 82–158, 89 FCC 2d 928, Mimeo No. 31192 (released April 8, 1982) [hereinafter cited as Interim Order]; Tentative Decision, CC 4563 (released June 11, 1982) (tentative resolution of several technical and operational questions in carrier network interconnection), tariff prescription, FCC 82–264, Mimeo No. 31573 (released June 11, 1982), 91 FCC 2d 483.

4. WU seeks initial authorization to provide direct service to the United Kingdom, Italy, Peru, Hong Kong, Singapore and Australia, with one voice-grade satellite half-circuit leased from Comsat to each point. Additionally, WU requests authority to lease or establish from its own facilities eleven voice-grade channels to link its various operating centers, and to interconnect with the facilities of the IRCs and Comsat. WU will provide services to overseas points for which it has not yet acquired an operating agreement[5] by transiting the facilities of U.S. and foreign carriers.[6] WU states that it intends to file additional applications to establish direct service arrangements for additional countries, or to augment facilities where authorization to serve has already been granted.[7]

5. WU claims that its entry into overseas markets will "permit full and vigorous competition in both international and domestic record communications markets without the constraints imposed by an artificial division of the market." WU projects tangible public benefits from its international services. It asserts that it possesses the technical, financial and

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[5] U.S. overseas carriers and their foreign correspondents establish an accounting rate (a figure for each unit of service which the carriers use to pay for the other's service) and a settlement rate (a division of the accounting rate, ordinarily 50/50. After inbound and outbound traffic volumes are totalled, the carriers calculate the net traffic yields and the amount due or owed pursuant to the accounting and settlement rates. The settlement rate includes specific currency conversion levels to facilitate a final accounting. While a U.S. carrier's rate to the public (the collection rate) is established by that carrier and may vary, all carriers providing service to the same overseas points apply the same rate in settling with the foreign administration. *See* Uniform Settlement Rates on Parallel International Communications Routes, 66 FCC 2d 359. (1977), *policy affirmed*, 84 FCC 2d 121 (1980).

[6] Transiting is the process by which a message "is routed through a third common carrier's facilities in order to reach the final destination . . . because the sender and receiver are geographically separate and direct interconnection is technologically difficult, inferior, or impossible." Establishment of Regulatory Policies Pursuant to the Communications Act of 1934 with Respect to Use of Communications Facilities in the United States by Foreign Entities for Communication Traffic Transiting the United States, Docket No. 19031, FCC 81-188, Mimeo No. 29209 at 1-2 (released May 5, 1981). Transiting may also occur when a carrier lacks operating agreements with foreign correspondents. Recent tariff modifications concerning transiting traffic by WU and the IRCs in accordance with the RCCA and our Interim Order indicate that WU may employ the facilities of another U.S. carrier to transit its traffic to the destined locale. Under these new transiting arrangements WU (or any originating international carrier without an opening agreement) would establish the collection rate and collect that rate from its customer. The originating international carrier would then transfer to the international carrier with an operating agreement a sum pursuant to a prescribed formula. Under this formula, the international carrier with the operating agreement is assured a payment equal to its foreign obligations (one-half of the accounting rate) plus an additional sum depending on the domestic carrier's charge and its own international charge.

[7] WU has filed two additional applications, one to provide direct services to Colombia, the Philippines, the Federal Republic of Germany, Austria, Surinam, Chile, and beyond. File No. I-T-C-82-228 (one to provide direct services to Colombia, the Philippines, the Federal Republic of Germany, Austria, Surinam, Chile, and beyond. File No. I-T-C-82-228 (on public notice July 7, 1982) and the other to Argentina, Brazil, Costa Rica, El Salvador, France, Guatemala, Honduras, Indonesia, Israel, Japan, New Zealand, Nicaragua, Panama, Republic of Korea, Saudi Arabia, South Africa, Taiwan, Thailand, United Arab Emirates, Venezuela and beyond. File No. I-T-C-82-233 (on public notice July 14, 1982).

operational skills to foster lower telex rates and provide users with new services. It contends that competition is feasible in a rapidly growing international marketplace and that there will be no undue adverse impact on existing carriers from its entry. WU points out that the lucrative international telex market is growing at an annual rate of 15 to 20 percent. It expects to handle 8.5 million, 20 million and 34.5 million outbound minutes of telex traffic in its first three years of operations. Because the acquisition of operating agreements is necessary to accrue inbound traffic, WU expects little inbound traffic until its second year of operation.[8] Given a projected growth in outbound international telex traffic from 190 to 252 million minutes per year during the first three years of its operations, WU alleges that its market penetration of 5 percent in the first year and rising to 15 percent in the third year will not result in a net reduction in traffic handled by existing carriers.

6. WU plans to invest nearly eleven million dollars during the first year of operation. It expects the start up costs and approximately eight million dollars in operating expenses will lead to a first year loss of $2,576,000. However, WU projects second year net revenues of $5,779,000 and third year net revenues of $16,711,000.

## *II. Petition to Deny and Other Comments*

7. Four international record carriers (IRCs) filed comments challenging the application. RCA Global Communications, Inc. (RCA) filed a Petition to Deny. ITT World Communications, Inc. (ITT) Western Union International, Inc. (WUI) and TRT Telecommunications Corp. (TRT) filed comments seeking deferment of the application or the imposition of conditions on authorization of WU to enter overseas markets. The American Telephone and Telegraph Co. (AT&T) filed a brief comment urging our prompt resolution of Docket No. 80–632 in which we are reconsidering our *TAT–4* policy which limits AT&T to providing primarily voice-only service. WU submitted a consolidated opposition to the IRC's pleadings to which the IRCs replied. WU did not respond to AT&T's comments.

### *A. IRC Comments*

8. The IRCs first address the timing of our consideration of WU's application. They then express broad concerns about whether WU will be

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[8] While perhaps not receiving any significant amount of direct inbound traffic until its second year of operation, we note that WU may receive inbound traffic and revenues under Section 222(c)(1)(A)(ii) concerning pro rata traffic distributions. Under this provision a carrier responsible for generating and handing off international outbound traffic to an international carrier is entitled to receive a commensurate amount of international inbound traffic from that international carrier. Procedurally, we note that the operation of this section as implemented by our Interim Order has been stayed. TRT Telecommunications Corporation v. FCC, Case No. 82–1658 *et. al.* (D.C. Cir. Released July 2, 1982).

able to use its domestic record services market to engage in anticompetitive behavior in overseas markets. They challenge the completeness of the application and express concern about the standard by which we will evaluate it. They also seek the imposition of various conditions on any authorization that may be granted WU.

9. *Timing of Our Consideration.* The IRCs seek to delay Commission consideration of WU's application. They view the statutory moratorium on Commission authorization of WU's entry into overseas markets as an indication that we must first insure their ability to compete with WU in domestic markets before authorizing WU's entry into overseas services. They see a head start in the domestic market as necessary to offset likely reductions in overseas revenues. In the IRCs' view, alleged lowered growth in telex traffic, financial losses in many non-telex record services, and WU's alleged recalcitrance in complying with interconnection requirements require the Commission to withhold action on WU's application.

10. WUI argues that the RCCA's 120 day moratorium on our consideration of WU's application cannot even start to run until full facilities interconnection is accomplished. ITT views the RCCA as anticipating the establishment of a viable IRC domestic record network which must precede the Commission's authorization of WU's overseas operations. It urges that so long as WU–IRC network interconnection arrangements consistent with the Commission's Interim Order are incomplete, WU should not be permitted even to commence operations. TRT underscores this premise with a recitation of the RCCA's requirement that WU afford the IRCs interconnection to its domestic network, equal in type and quality with that which it will provide to its own overseas operations. Essentially, the IRCs request that the Commission postpone assessment of WU's application until all technical, operational and logistical interconnection questions are resolved.

11. *Exploitation of domestic market position.* The IRCs argue that the development of a fully competitive domestic and international record services marketplace requires a check on the ability of WU to use its domestic market power to gain unfair competitive advantages in overseas markets. The IRCs allege that WU has enjoyed a 40-year *de facto* monopoly in the domestic record market. As a result, its current market position of over 140,000 subscribers provides it with the ability to engage in cross-subsidization and predatory pricing through integration of its international and domestic operations. RCA notes that WU's domestic dominance has been previously recognized by the Commission.[9] It claims

[9] Policy and Rules Governing Rates for Competitive Common Carrier Services and Facilities Authorizations, 85 FCC 2d 1 (1980).

that, without adequate safeguards, WU's entry may threaten the viability of existing IRCs.

12. The IRCs also contend that WU will disrupt or disregard U.S. policies aimed at protecting U.S. carriers from foreign "whipsawing,"[10] by granting improper concessions to acquire foreign operating agreements and allocations of inbound traffic volumes. They further contend that unfettered WU entry will ultimately constitute a detriment to consumers who will face higher rates with lower service quality. Lower service quality allegedly will result from indiscriminate circuit acquisitions by WU which will disrupt balanced loading of cable and satellite circuits.[11]

13. *Section 214 evaluation.* The IRCs argue that the enactment of the RCCA does not relieve the Commission from the obligation to review WU's application under Section 214 of the Communications Act based on longstanding decision-making criteria. The IRCs maintain that the RCCA does not contemplate the automatic grant of WU's application, and hence, the Commission retains all powers to require the threshold showing that competition through WU's market entry is feasible and that such competition will serve the public interest. In this respect, they question the sufficiency of WU's economic data and traffic projections and contend that an evidentiary hearing is required to resolve outstanding questions on the effect of WU's entry into overseas markets.

14. The IRCs allege that WU's entry will do little to improve the quality, availability, or diversity of service. RCA implies that WU entry may threaten to render less competitive the "diverse, multi-firm industrial structure" under which the IRCs compete. RCA also suggests that WU's use of foreign transit facilities will idle U.S. carrier plant resulting in a significnt cash outflow. And it asserts that WU has failed to file foreign operating agreements as required by Part 43 of the Commission's Rules.

15. *Conditions on the Grant of Authority.* The IRCs point out that the Commission retains the power to condition WU's entry into the overseas market. While in no way conceding that we should grant WU's application, they request conditions that they believe will temper WU's ability to exploit unfairly its domestic market position. The IRCs desire limitations on the scope of authorization and on the flexibility of future WU operations. TRT seeks to restrict WU's inbound traffic volume to an amount no greater than what WU hands off directly to any overseas carrier. It also

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[10] "'Whipsaw' is the term used to describe the ability of the foreign correspondent to utilize its monopoly power to pay one carrier against others to gain concessions and benefits from the U.S. international carriers." Uniform Settlement Rates on Parallel International Communications Routes, 84 FCC 2d 121, 122, n. 3 (1980).

[11] *See* Policy to Be Followed in Future Licensing of Facilities for Overseas Communications, Docket No. 18875, Report Order and Third Statement of Policy and Guidelines, 67 FCC 2d 358 (1977), comprehensive plan adopted 76 FCC 2d 522 (1980).

requests that WU be limited to the carriage of inbound traffic only from those countries with which WU possesses operating agreements. This allegedly would curb WU's zeal to offer a sweetheart financial arrangement with a foreign administration in violation of the Commission's policy on uniform settlement rates on parallel international communications routes. RCA seeks a requirement that WU only use the facilities of U.S. carriers to provide transiting services. ITT seeks to have WU's authorization limited to the six countries for which direct service will initially commence and to the services which WU has indicated it will offer initially. ITT wants assurance that WU will be subject to the same Section 214 filing standards and the same traffic, revenue, transiting and operating agreement reporting requirements as the IRCs. WUI does not request conditions or limitations, but reserves the right to do so after the pleading cycle has run. It claims that WU's alleged failure to comply with the RCCA and the Commission's Interim Order should prevent any authorization from being issued. The other carriers similarly reserve the right to comment on the need for additional conditions on any WU authorization as interconnection arrangements are made.

### *B. AT&T Comments*

16. AT&T does not object to the grant of WU's application. However, AT&T urges prompt Commission resolution of Docket No. 80–632 removing the *TAT–4* restrictions on AT&T's provision of record services and the IRC's provision of overseas voice services.[12] Otherwise, AT&T claims, WU might be authorized to offer a combination of services which other carriers are prohibited from providing because of restrictions imposed by our *TAT–4* policy.

### *C. WU Opposition*

17. In its opposition to the IRC comments, WU states that its application is the culmination of the RCCA's policy to promote competition in the international record market which heretofore has been the source of inordinately high profits for the IRCs. WU argues that competition in overseas markets is reasonably feasible and beneficial to the public. A grant of its application will stimulate, rather than hinder competition, by disrupting the IRC "cartel". WU points out that reduced rates were realized with its entry into the U.S. Mainland-Hawaii telex service market. It asserts that the IRCs were forced to reduce their $1.15 per minute rate to meet the 34.75 cent per minute rate recently tariffed by WU.

18. WU brands as a delay tactic IRC efforts to interpret the time schedule in the RCCA as mandating conclusion of all WU–IRC network

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[12] *See* Overseas Communications Services, 84 FCC 2d 622 (1980). *See also* American Telephone and Telegraph Co., 37 FCC 1151 (1964).

interconnection negotiations and arrangements before WU's application can be considered by the Commission. It asserts that the statute is unambiguous on its face in setting a 210 day moratorium period running from enactment of the RCCA and a 120 day moratorium period running from establishment of a negotiated carrier network access arrangement or interim Commission prescription. WU alleges that the RCCA's legislative history indicates that Congress contemplated that the difficult task of facilities interconnection would not necessarily be concluded at the time when the Commission could begin its consideration of WU's application.

19. In addition, WU contends that it has complied with the RCCA's provisions and our Interim Order. It states that it participated in the interconnection negotiations and has filed the required tariffs with the Commission. It likewise asserts that it should be treated like any other new carrier. It recognizes that it must obtain foreign operating agreements, but points out that their acquisition does not constitute a prerequisite to an application for authorization. WU indicates that it will acquire operating agreements within two years of FCC service authorization and that it will file with the Commission all agreements within 30 days of acquisition.

20. WU objects to the IRC contention that its domestic record services market power translates into a proclivity or capacity to engage in anticompetitive conduct in international markets. WU indicates that the IRC presence in the domestic record service marketplace casts doubt on the Commission's tentative designation of it as a dominant carrier,[13] and also checks any potential for it to overprice such services. WU asserts that it has available no source of domestic services revenues that would enable it to underprice its new international services. Nevertheless, WU asserts that it will still be able to undercut the existing rates charged by the IRCs. WU notes that it was able to secure significantly cheaper transiting rates from two foreign carriers,[14] as well as discount volume traffic distribution contracts with TRT and FTC Communications, Inc. WU argues that the fact that several international carriers could provide the international haul at a rate substantially below existing IRC public or transiting rates bolsters its contention that it will likewise be able to tariff lower international rates and serve the public interest by fostering downward rate pressure. Regardless of its dominant or non-dominant categorization, WU seeks to have its application here judged by the same

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[13] WU's designation as a dominant carrier is currently under review by the Commission in the Competitive Carrier Rulemaking, Docket 79–252.

[14] WU reports that prior to the Court-mandated discontinuation of its "Low Cost Routing Service" to foreign points via Mexico and Canada, it was able to provide service at 20–30% below U.S. IRC rates. See Western Union Telegraph Co. 75 FCC 2d 461, 463 (1980), *reversed sub nom.*, ITT World Communications Inc. v. FCC, 635 F.2d 32 (2nd Cir. 1980).

standards as any other applicant to provide international service would face.

21. WU asserts that competition is feasible and that it stands ready to serve the public interest with lower rates, innovative new services, and elimination of the IRCs' cartel control of overseas record services. It contends that the IRCs have presented no data indicating that WU's entry will cause such traffic losses and revenue drops as to impede any IRCs' ability to serve the public. WU's projects that real growth in telex traffic will continue such that there will be no decline in current levels of IRC revenues. It claims that its projections are unchallenged and that much of the data upon which they are based is a matter of public record. Therefore WU argues that no questions of law or fact exist that warrant a hearing.

22. Consistent with its desire for equality of treatment, WU expects that its facilities authorization will cover any related service including those that may not initially be offered to authorized points. WU argues that the restrictions prudently placed on a consolidated RCA domestic and international operations are peculiar to RCA and should not force WU to establish a separate international operations subsidiary. On the question of transiting, WU argues that it should not be singled out and ordered to employ U.S. carriers exclusively when no such condition is placed on other carriers. As to employing the same accounting rates of all other U.S. carriers, WU reports that it will apply for a waiver should it ever seek a deviation. WU concludes that a grant of its application will accomplish the Congressionally mandated goal of promoting competition in international record communications and providing benefits to users through lower rates, new services and improved consumer choice.

## *III. Discussion*

23. In reviewing WU's application, we (a) consider whether it is ripe for final Commission action; (b) evaluate it pursuant to the policy direction of the RCCA and the public interest standards of Section 214; and (c) consider the comments of the parties including the IRCs' requests for the imposition of conditions on WU's authorization.

24. *Timing of our Consideration.* At the outset we find that WU's application is ripe for final Commission action. The RCCA is clear on its face. Section 222(c)(5) states that the moratorium on final Commission action on any WU application "shall expire at the end of the 210–day period following the date of the enactment of the Record Carrier Competition Act of 1981."[15] The RCCA was signed into law by the President on

[15] RCCA, Section 222(c)(5).

December 29, 1981. Accordingly, the Commission may take final action on WU's application after July 27, 1982.

25. The IRCs attempt to link their concept of successful interconnection arrangements with the time at which we may begin to evaluate WU's application. This linkage conflicts with the legislative intent of the RCCA to establish "counter-incentives," to spur the parties into establishing voluntary interconnection arrangements.[16] In order to encourage voluntary interconnection arrangements and, at the same time remove any incentive for the IRCs to stall negotiations in order to delay WU's entry, the RCCA sets up two alternative moratorium periods on WU international authorization. Had the parties established voluntary interconnection arrangements, WU could enter overseas markets after a 120 day moratorium period. If no interconnection agreement could be reached, the statute applies a 210 day moratorium. The statute also requires that, in the case of no agreement, the Commission shall prescribe the terms and conditions of interconnection. In the present case, notwithstanding lengthy negotiations, the parties were unable to reach an agreement and therefore the Commission executed its statutory duty to prescribe appropriate interconnection provisions. Because interconnection is now in effect, and 210 days have run from enactment of the RCCA, the IRC-posed question of linkage between carrier interconnection and evaluation of WU's application is moot. In any case, it is clear that Congress did not intend to link Commission action on a WU application with any aspect of carrier interconnection arrangements beyond 210 days from enactment of the RCCA.[17]

26. We, of course, recognize as the IRCs argue that WU's compliance with the RCCA and our prescription order is a factor to be weighed in considering WU's application. Our review of the tariff filings and interconnection requests indicates that WU has generally complied with the RCCA and our prescription orders. We therefore find that no delay in considering this application is warranted. We further find that WU's degree of compliance with the RCCA obviates the need at this time for the attachment of interconnection conditions.

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[16] *See* Committee Report at 13: WU is permitted "to go overseas at the end of this 120 day moratorium period, provided that the interconnection arrangements are being implemented as rapidly as possible." The 210 day deadline was established to serve as an incentive in part "to encourage the IRCs to negotiate in good faith, since they know Western Union will enter the international market with[in] 210 days. . . ." *Id.* at 6.

[17] In fact, Congress declined to impose a more lengthy moratorium on the opportunity for WU to file an application for international authorization. *See, e.g.*, Statement of Eugene F. Murphy, President of RCA Global Communications, Inc. in International Record Carrier Competition Act of 1981, Hearings before Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation, 97th Cong., 1st Sess. Serial No. 97–5 at 51 (February 18, 1981) (urging the imposition of a three year "catch-up" period for IRC entry to the domestic record market and proscribed WU entry to international markets for that time period).

27. *Section 214 analysis.* In the RCCA Congress has stated that "the Commission shall, to the maximum extent feasible, promote the development of fully competitive domestic and international markets in the provision of record communications service, so that the public may obtain record communications service and facilities (including terminal equipment) the variety and price of which are governed by competition."[18] Congress further required the Commission to "reduce the extent to which it regulates record carriers as the development of competition among record carriers replaces the need for regulation to protect the public." It is Congress' directive that the Commission follow a policy of open entry into all markets, and grant all permits requested promptly unless the carrier is not living up to its obligations under the RCCA.[19]

28. This broad pro-competitive, open-entry policy amends the standard for entry set forth in *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953). In that case, the Court said that the standard governing entry of new carriers in a given market requires that the Commission determine that competition is reasonably feasible in those markets sought to be served and that added competition is in the public interest. The court stressed that the Commission may not authorize entry of a new carrier in a particular market on an assumption that competition is advantageous, but must show that competition will serve some beneficial purpose and therefore be in the public interest. However, in enacting the RCCA, Congress predicated the underlying statutory scheme of the legislation, in part, on the assumption that competition in both the domestic and international markets will better serve the needs of users of record services.[20] In effect, Congress has made a general policy determination that competition in record communications markets serves the public interest and constitutes a goal which this Commission is mandated to attain. In view of this mandate, we conclude that Congress does not intend that we continue to assess whether competition is reasonably feasible and will serve some beneficial purpose in evaluating applications for the provision of record communications services. Continued application of the *RCA* standard is unnecessary and would be inconsistent with the policy underlying the RCCA.

29. WU's entry into overseas markets will serve the goal of the RCCA by promoting competition in international record communications services. WU will offer users an expanded choice of carriers with the prospect for reduced rates and new service offerings. WU has filed tariffs in anticipation of Commission action on this application that purpose rates for telex service at a significant discount below that currently charged by

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[18] RCCA, Section 222(b)(1).
[19] Committee Report at 13.
[20] *Id.* at 5–6.

the IRCs. Thus, it appears that WU's application has already presented the public with some of the benefits Congress anticipated in passing the RCCA. In addition to these price reductions, we expect WU's expansion into the international market to produce tangible improvements in service quality. Prior to passage of the RCCA and when the IRCs were limited to serving users in gateway cities,[21] users located in hinterland points, i.e., non-gateway cities, were required to use two carriers for any international call. We have recently acted to permit the IRCs virtually unlimited expansion of domestic points served. That action together with WU authorization to provide international service should now make direct single carrier service available to nearly all U.S. telex users. As WU gains operating agreements with foreign correspondents and expands its international service and as the IRCs expand domestically, users in hinterland points will for the first time be able to choose among competitive carriers. Based on the price and quality of service benefits we foresee, we can conclude that grant of WU's application is in the public interest.

30. Even if judged under the *RCA* standard grant of WU's application is warranted. Under *RCA*, in addition to finding that authorization of a new competitor will benefit the public we must also find that competition is feasible. This is established in this case by reference to the anticipated market growth. Annual outbound U.S. telex traffic growth has averaged a healthy 16.9 percent since 1977 with inbound growth averaging 14.6 percent over this period.[22] An even higher annual increase since 1977 in both inbound and outbound traffic of approximately 19.9 percent[23] has occurred for telex traffic with the six nations which WU intends to serve initially. Given this pattern of traffic growth and assuming that WU succeeds in its 15 percent market penetration goal, the IRCs will not likely suffer actual traffic volume declines. WU's traffic growth and market penetration projections, which the IRCs do not dispute, would leave existing carriers with substantial traffic volume (and revenues) after WU's entry. The traffic data indicates that WU's market penetration will generally equate with the market's expected growth. These forecasts, together with the overall level of revenues accrued by the IRCs, the profitable degree of telex service and the substantial rates of return this service generates, demonstrate beyond question that the limited initial competition proposed by WU is feasible without a deleterious effect on the cost, quality and availability of service to the public.[24] Even consider-

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[21] International Record Carrier's Scope of Operations (Gateways) 76 FCC 2d 115 (1980) *aff'd sub nom.* Western Union Telegraph Company v. FCC, 665 F. 2d 1126 (D.C. Cir. 1981).

[22] *See* Statistics of Communications Common Carriers, Table 27 (1977–1980).

[23] *Id.* Table 27 at 168–170.

[24] *See* Statistics of Communications Common Carriers, Table 23 of 157 (1980). *See also* Preliminary Audit and Study of Operations of International Carriers and Their Communications Services Between the United States and Overseas and Foreign Points, Dockets No. 20778, 59 FCC 2d 240 (1976), *Preliminary Audit Report*, 75 FCC 2d 726 (1980).

ing other Commission actions which have fostered additional competitive incursions on IRC markets, we remain confident that any revenue diversion created by WU's entry will not adversely affect the IRCs' ability of the industry to provide international services to the public.[25]

31. No carrier opposing WU's application presents data showing that WU's entry will jeopardize its ability to serve the public. RCA implies that a grant of WU's application will have a "potential adverse impact . . . on essential services . . . [which] outweigh any public benefit that may reasonably be expected . . . ." However, RCA fails to demonstrate how.[26] It also fails to furnish statistical compilations or traffic projections attesting to likely harm to existing carriers.

32. RCA argues that WU's proposed offerings will merely duplicate existing IRC services. RCA also alleges that a long history of WU domestic service rate increases and violations of FCC rules, regulations, and policies will be repeated in the international record service market with authorization of WU. However, the Commission need not be presented with an application for an entirely new service.[27] We are only required to warrant, as we have, that public benefits will result from entry of a new carrier. We have found that WU's entry into overseas markets offers the prospect for reduced rates, greater customer choice and new services.

33. Finally, based on WU's longstanding domestic operations and the information provided in its application, we also find that WU is legally, financially, and technically qualified to provide international record communications services. Therefore, we conclude that WU's application satisfies the *RCA* standard.

34. *Potential Anticompetitive Conduct.* The IRCs allege that WU has the capacity to engage in anticompetitive and predatory behavior by virtue of its monopoly position in the domestic record services marketplace. They fail to specify how WU will be able to integrate its domestic and international operations with the ability to underprice its new international offerings. Nevertheless the IRCs request that we

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[25] We also note that the IRCs will earn additional revenues from new domestic record services and international voice offerings. *See* RCA Global Communications, Inc. *et al.*, 88 FCC 2d 905 (1982).

[26] The IRCs' claims of diversion are strikingly similar to WU's claims in *Gateways*, 76 FCC 2d 115. In *Gateways*, WU argued that expanded IRC entry into the domestic market would result in revenue losses and eventual impairment of service capacity. The IRCs dismissed these arguments out of hand. We rejected them as unsupported by the record and recognized them as simply an attempt to exclude competition. We reach the same conclusion here.

[27] *See, e.g.*, Graphnet, Inc. 63 FCC 2d 402, *reconsideration denied*, 67 FCC 2d 1020 (1978), *affirmed in part sub nom.* ITT World Communications Inc. v. FCC, 595 F. 2d 897 (2d Cir. 1979), *on remand*, 71 FCC 2d 1066 (1979); International Relay, Inc., 77 FCC 2d 819 (1980), *on reconsideration*, 82 FCC 2d 41 (1980); Tymnet, Inc., File No. I-T-C–88–210, mimeo no. 3223 (released March 8, 1982); GTE-Telenet Communications Corp., File No. I-T-C-82–274, mimeo no. 2765 (released March 15, 1982) (reconsideration pending) (packet switching over leased international lines). *See also* AT&T v. FCC, 539 F. 2d 767 (D.C. Cir. 1976) (FCC not required to find that specialized common carrier applicant will provide a substantially new service to justify authorization).

impose a variety of conditions and limitations on WU's international operations ostensibly to prevent it from exploiting its preexisting, allegedly "captive," 140,000 domestic subscriber base.

35. The IRCs' speculation on the threat of anticompetitive behavior ignores the fact that provisions in the RCCA specifically address how a fully competitive domestic and international record services marketplace will evolve. The RCCA mandates universal customer access and facilities interconnection equal in type and quality. It expressly prohibits cross-subsidization between services, and forces carriers providing both international and domestic offerings to establish separate tarrifs for each type of service. The carrier interconnection arrangements and our tariff prescription, already in place, insure that WU overseas services will not benefit from false operational, financial, or technical advantages. Our Interim Order and tariff prescription, based upon it, will, we believe, foster interconnection parity and the likelihood of fair competition. A fully competitive domestic and international record services marketplace permits IRC domestic services and WU international services without affecting the comparative advantages particular carriers enjoy. While the IRCs must combat WU's "headstart" in the domestic record service market, WU is similarly at a disadvantage *vis a vis* the IRCs in the international market. Indeed, WU may face a greater hurdle as it must obtain operating agreements with foreign PTTs which have in the past demonstrated a reluctance to expand the number of U.S. carriers with which they interconnect. The IRCs face no such artificial barrier as they expand into WU's domestic market. Thus, we see no inequity in the statutory scheme of the RCCA. In any case, it is our obligation to enforce that statute. To the extent the IRCs are concerned that WU will engage in anticompetitive conduct, we believe that our regulatory obligations under the Communications Act and the RCCA require that we prevent such conduct.

36. *Miscellaneous Issues.* We have been presented with no substantive or procedural reasons to delay action on WU's application. Title II of the Communications Act affords no express opportunity for an evidentiary hearing.[28] Generally a Section 214 authorization of a carrier to expand its service area invokes "no all-encompassing policy issue, requiring hearing."[29] We have afforded all parties an opportunity to express their views in written form, and have been able to resolve the material questions of law and fact raised. Therefore, no evidentiary hearing is necessary since we have already acquired sufficient data with which to make an informed and reasoned decision.

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[28] *See* Satellite Business Systems, *et al.*, 62 FCC 2d 997, 1066, *reconsideration denied*, 64 FCC 2d 872 (1977), *affirmed sub nom.*, United States v. FCC, 652 F. 2d 72, 88–92 (D.C. Cir. 1980) (hearing requirement in Title II applications distinguished from Title III standard).

[29] TRT Telecommunications Corp., 46 FCC 2d 1042, 1054 (1974) (authorization of TRT to serve as the fifth carrier to serve the U.S.—United Kingdom route with international record services).

37. In addition, we have been presented with no valid justification for restricting the scope, nature[30] or flow of the traffic for which WU can seek authorization. We will not limit WU to inbound traffic volumes no greater than what it sends out directly since WU will be bound by our uniform settlement rates on parallel international communications routes policy.[31] Any additional limitation on its bargaining strength or strategy in dealing with foreign administrations may inhibit WU's ability to acquire operating agreements. Likewise we will not limit WU to the transiting services of U.S. carriers. We have already concluded that this restraint is anticompetitive,[32] and rather than idle U.S. facilities, a competitive market for WU transit traffic can spur efficiency among all carriers. Likewise, we will not delay review of WU's application pending its acquisition of necessary foreign operating agreements.[33]

*IV. Conclusion*

38. Congress has mandated the Commission to promote competition in the provision of domestic and international record services. The action we take today in granting WU's application is consistent with the RCCA and furthers this goal. We conclude that WU's entry into overseas markets will likely result in downward rate pressure, encourage service diversity, create incentives for more efficient operations and result in operational convenience for users. WU shall be certified as an international record carrier fully subject to existing and future rules, regulations, limitations, and reporting requirements imposed on such carriers. WU may expand the scope of its regularly authorized services, seek facilities for additional direct service points, and request authorization for new service offerings by filing applications pursuant to Part 63 of the Commission's Rules and Regulations.

*Certification Order and Authorization*

39. In view of the foregoing, IT IS CERTIFIED, that the present and future public convenience and necessity requires that The Western Union

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[30] WU's initial services will not provide a combination of voice and record offerings in violation of the TAT–4 policy. We are currently reviewing the TAT–4 voice/record dichotomy and will assess whether WU, AT&T and the existing IRCs can provide any type of service. *See* Overseas Communications Services, 84 FCC 2d 622, 629–630 (1980).

[31] We have noted that "whipsawing" of U.S. IRCs by foreign administrations is possible since the PTT controls the flow of traffic destined for the U.S. and can play one carrier off another to secure a higher toll revenue division in exchange for a higher volume of inbound U.S. traffic. WU may have a greater incentive to strike a better deal, but it must first acquire a waiver from the Commission.

[32] Interim Order at paragraph 104, n. 36.

[33] WU has filed with the Commission those operating agreements that it has obtained. We will not limit or delay processing WU's application pending the applicant obtaining operating agreements for those countries which it seeks to serve but has not yet obtained agreements. However, we are obligated to impose a time limit on the acquisition of foreign operating authority by WU. *See* Graphnet, Inc., 63 FCC 2d 402, *reconsideration denied* 67 FCC 2d 1020 (1978), *affirmed in part sub nom.*, ITT World Communications, Inc. v. FCC, 595 F. 2d 897 (2d Cir. 1979), *on remand*, 71 FCC 2d 1066 (1979) (three year time limit on acquisition of operating agreement imposed); *accord*, International Relay, Inc. 77 FCC 2d at 825–826; *See also* Committee Report at 12.

Telegraph Company establish, acquire and operate facilities for the purpose of providing telex, TWX, telegram and private line (data or alternate voice/data) services between the United States and Australia, Hong Kong, Peru, Singapore and the United Kingdom and points beyond.

40. Accordingly, IT IS ORDERED, pursuant to Section 214 of the Communications Act, that the application of The Western Union Telegraph Co., File No. I-T-C–82–142 IS GRANTED and WU is authorized to: establish, acquire and operate the following facilities:

(a) Three voice grade channels to be leased from AT&T between Western Union's New York operating center and Comsat's East Coast earth station at Etam, West Virginia.

(b) Three voice grade channels to be established from Western Union's own facilities between its New York operating center and its Wire and Repeater Room in San Francisco, California.

(c) Three voice grade channels to be leased from AT&T between Western Union's Wire and Repeater Room at San Francisco and Comsat's West Coast earth station at Jamesburg, California.

(d) One voice grade satellite half-circuit to be leased from Comsat between Comsat's station at Etam, West Virginia, and an INTELSAT Atlantic Ocean satellite interconnecting with matching facilities provided by British Telecommunications International of the United Kingdom.

(e) One voice grade satellite half-circuit to be leased from Comsat between Comsat's earth station at Etam, West Virginia, and an INTELSAT Atlantic Ocean satellite interconnecting with matching facilities provided by Italcable of Italy.

(f) One voice grade satellite half-circuit to be leased from Comsat between Comsat's earth station at Etam, West Virginia and an INTELSAT Atlantic Ocean satellite interconnection with matching facilities provided by Entel-Peru SA of Peru.

(g) One voice grade satellite half-circuit to be leased from Comsat between Comsat's earth station at Jamesburg, California and an INTELSAT Pacific Ocean satellite interconnecting with matching facilities provided by Cable & Wireless (HK) Ltd. of Hong Kong.

(h) One voice grade satellite half-circuit to be leased from Comsat between Comsat's earth station at Jamesburg, California and INTELSAT Pacific Ocean satellite interconnecting with matching facilities provided by Telecommunications Authority of Singapore.

(i) One voice grade satellite half-circuit to be leased from Comsat between Comsat's earth station at Jamesburg, California and an INTELSAT Pacific Ocean satellite interconnecting

with matching facilities provided by Overseas Telecommunications Commission of Australia.

(j) One voice grade channel to be established from Western Union's facilities between its informaster computer center in Middletown, Virginia and its operating center in New York.

(k) One voice grade channel to be established from Western Union's facilities between its operating centers in New York and Mahway, New Jersey.

41. IT IS FURTHER ORDERED, that the authority granted to WU must be implemented by the acquisitions of an operating agreement within a period of three years from the release date of this order. Copies of operating agreements shall be filed with the Commission within 30 days of their execution.

42. Failure to decline the authorization, as conditioned, within 30 days of the release date of this order, will constitute formal acceptance of the authorization, as conditioned.

43. This authorization is effective upon adoption.

44. IT IS FURTHER ORDERED that the Petition to Deny filed by RCA and requests by other parties for conditions on WU's authority ARE HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico *Secretary*

* U.S. GOVERNMENT PRINTING OFFICE: 1983– 381-692: 2006